Petition

81 - 512
No.

Office - Supreme Court, U.S.
FILED
SEP 14 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TELETYPE CORPORATION,
Petitioner,

vs.

TOMMIE W. TAYLOR, LARRY C. PEYTON, JAMES H. BIBBS
AND JOSEPH HARRIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Eighth Circuit

G. ROSS SMITH
1215 Tower Building
Little Rock, AR 72201
(501) 376-6604

JAMES M. STAULCUP, JR.
5555 Touhy Avenue
Skokie, IL 60077
(312) 982-3090
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Where the court of appeals holds that the issue of whether the employer "engaged in widespread discrimination, or merely a few isolated illegal acts" remains unresolved following a full trial of the liability stage of a class action under Title VII, Civil Rights Act of 1964, and vacates injunctive relief as premature, can a finding of class-wide liability for racially discriminatory demotions be sustained? *See International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977).

2. Where only three of 1,132 demotions (including 301 black demotions) have been found to be racially discriminatory, and the statistical evidence presented by the class members and the employer on demotions demonstrate no adverse treatment or impact, can a class-wide finding of liability for racially based demotions be sustained on the basis of evidence not directly related to demotions which the court of appeals characterizes as "circumstantial" and "not particularly strong"? *See Teamsters, supra,* and *East Texas Motor Freight* v. *Rodriguez,* 431 U.S. 395 (1977).

3. Whether, under the facts of this case, the court of appeals improperly distorted the burden of proof principles set forth in *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. ____, 67 L.Ed 2d 207 (1981)?

LIST OF PARTIES

Petitioner is Teletype Corporation,[1] the employer-defendant in the district court. Respondents are Tommie W. Taylor and Larry C. Peyton, plaintiffs in the district court, and James H. Bibbs and Joseph Harris, plaintiffs-intervenors in the district court.

---

[1] Teletype Corporation is a wholly-owned subsidiary of Western Electric Company, Incorporated, which is a wholly-owned subsidiary of American Telephone and Telegraph Company. Other affiliates of American Telephone and Telegraph Company are set forth at A-92 of the Appendix.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	20
Appendix	A-1

TABLE OF AUTHORITIES

Cases Cited

International Brotherhood of Teamsters v. United States, 431 U. S. 324 (1977) i,2,9,10,13,14,20

East Texas Motor Freight v. Rodriguez, 431 U. S. 395 (1977) i,2,10,15,18,20

Texas Department of Community Affairs v. Burdine, 450 U.S. ____, 67 L.Ed. 2d 207 (1981) i,2,19,20

Taylor v. Teletype Corp., 475 F. Supp. 958 (E. D. Ark. 1979) 1,4,12,13,14,17

Taylor v. Teletype Corp., 478 F. Supp. 1227 (E. D. Ark. 1979) 1,4

Taylor v. Teletype Corp., 492 F. Supp. 405 (E. D. Ark. 1980) 1,4

Taylor v. Teletype Corp., 648 F.2d 1129 (8th Cir. 1981)........................1,5,7,8,10,13,14,15,17,18

Wade v. Mississippi Cooperative Extension Service, 528 F.2d 508 (5th Cir. 1976) 2,11

Wright v. National Archives and Records Service, 609 F.2d 702 (4th Cir. 1979) 2,11

Inmates of Nebraska Penal Complex v. Greenholtz, 567 F.2d 1368 (8th Cir. 1977) 2,11

Hoard v. Teletype Corp., 450 F. Supp. 1059 (E. D. Ark. 1978)....................................5,8,14,18

Booth v. Board of Directors, 475 F. Supp. 638 (E. D. La. 1979) 11

Casteneda v. Partida, 430 U.S. 482 (1977) 11

Hazelwood School District v. United States, 433 U. S. 229 (1977) 11,15

Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980) 12,13,14

Griggs v. Duke Power, 401 U.S. 424 (1971) 12,13

Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975) 16

Rios v. Enterprise Association, 501 F.2d 622 (2d Cir. 1974) 16

Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976) 16

Heagney v. University of Washington, 642 F.2d 1157 (10th Cir. 1981) 16

Harris v. Anaconda Aluminum Co., 479 F. Supp. 11 (D. C. Ga. 1979) 16

Statutes Cited

28 U.S.C. §1254(1) 2

42 U.S.C. §2000e-2 2

28 U.S.C. §1343(3) and (4) 3

42 U.S.C. §2000e-5(f) 3

42 U.S.C. §2000e-2(a) (1) 3

42 U.S.C. §2000e-5(g) 3

28 U.S.C. §2201 3

28 U.S.C. §2202 3

FED. R. CIV. P. 23(a) 3

FED. R. CIV. P. 23(b) (2) 3

FED. R. CIV. P. 52(a) 8

Texts

MORRIS, CURRENT TRENDS IN THE USE AND MISUSE OF STATISTICS IN EMPLOYMENT DISCRIMINATION LITIGATION (2d ed. 1978) 16

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TELETYPE CORPORATION,
Petitioner,

vs.

TOMMIE W. TAYLOR, LARRY C. PEYTON, JAMES H. BIBBS
and JOSEPH HARRIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

OPINIONS BELOW

The district court's opinions are reported as *Taylor* v. *Teletype Corp.,* 475 F. Supp. 958 (E. D. Ark. 1979), *Taylor* v. *Teletype Corp.,* 478 F. Supp. 1227 (E. D. Ark. 1979) and *Taylor* v. *Teletype Corp.,* 492 F. Supp. 405 (E. D. Ark. 1980). The opinion and order on rehearing of the United States Court of Appeals for the Eighth Circuit on which this petition is based are reported at 648 F.2d 1129 (8th Cir. 1981).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 1, 1981. Timely petitions for rehearing were filed and disposed of by entry of an Order on Rehearing on June 15, 1981. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254 (1) and seeks reversal of the opinion below affirming the finding of class-wide discrimination and the findings in favor of the individual plaintiffs and intervenor and prescribing the standard of proof to be applied to the claims of intervenor Bibbs and the class members. Review on certiorari is warranted by the conflict between the opinion sought to be reviewed and opinions of this Court in *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977) as to the requisite proof in establishing purposeful class discrimination, and *East Texas Motor Freight* v. *Rodriquez,* 431 U.S. 395 (1977) as to the requisite existence of class members who possess the same interest and suffer the same injury; the conflict with similar holdings by other courts of appeals, *Wade* v. *Mississippi Cooperative Extension Service,* 528 F.2d 508 (5th Cir. 1976) and *Wright* v. *National Archives and Records Service,* 609 F.2d 702 (4th Cir. 1979); and the conflict of the opinion below within itself and with another eighth circuit court opinion, *Inmates of Nebraska Penal Complex* v. *Greenholtz,* 567 F.2d 1368 (8th Cir. 1977). Review is also warranted in view of conflict with the burden of proof principles of *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. ____, 67 L.Ed 2d 207 (1981) and the need for judicial guidance as to the proper standard of proof to be applied as to intervenor Bibbs and the twenty-seven individual claims which remain to be heard below.

STATUTES INVOLVED

This is a class action alleging racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*

United States Code, Title 42:

§2000e-2. *Unlawful employment practices—*

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Eastern District of Arkansas on February 28, 1977 by Tommie W. Taylor and Larry C. Peyton against Teletype Corporation, invoking jurisdiction pursuant to 28 U.S.C. §1343(3) and (4) and 42 U.S.C. §2000e-5(f). The action sought equitable relief pursuant to 42 U.S.C. §2000e-2(a)(1) and 42 U.S.C. §2000e-5(g) as well as a declaratory judgment pursuant to 28 U.S.C. §§2201 and 2202. The Complaint alleged unfair employment practices based on race discrimination and purportedly was brought on behalf of a class of persons situated similarly to plaintiffs pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The district court certified a class of persons who had been *demoted* during a massive work force reduction occasioned by an economic downturn, which it defined as:

> "Those black employees of the defendant who were demoted on or after February 28, 1974, including both bargaining-unit and non-bargaining-unit employees and including those persons still employed by defendant and those persons no longer employed by defendant." 475 F. Supp. at 961.

Original plaintiffs Taylor and Peyton were joined by fourteen intervenors who adopted the allegations of the original Complaint.

Following trial, the district court found that class-wide racially discriminatory demotion practices had been shown for the years 1974, 1975 and 1976 but not thereafter, that Taylor's first demotion was not based on race but that her second demotion was, and that the first demotion of plaintiff Peyton, the demotion of intervenor Bibbs, and the second demotion of intervenor Harris were because of their black race. All claims of discriminatory demotions by the other twelve intervenors were rejected as not having involved racial considerations. *Taylor* v. *Teletype Corp.*, 475 F. Supp. 958 (E. D. Ark. 1979).

Thereafter, on November 2, 1979 the court entered a supplemental order, *Taylor* v. *Teletype Corp.*, 478 F. Supp. 1227 (E. D. Ark. 1979) which issued a broad injunction prohibiting Teletype from engaging in descriminatory practices of any type and prescribed a procedure to be followed in the submission of claims by other class members. On June 30, 1980, the district court entered an opinion finally disposing of all issues except the claims of twenty-seven alleged class members who have filed claims for relief. *Taylor* v. *Teletype Corp.*, 492 F. Supp. 405 (E. D. Ark. 1980).

Teletype filed an interlocutory appeal from the grant of the injunction and later an appeal from the final order of the district court as to individual and class liability. Four of the unsuccessful individuals cross-appealed. All three appeals were disposed of by the court of appeals' May 1, 1981, opinion and subsequent Order on Rehearing.

The court of appeals affirmed all findings of non-discrimination against individual appellants and vacated and remanded the finding of discrimination as to intervenor James Bibbs. The court of appeals found that the injunction rested on "relatively weak, although sufficient evidence of classwide discrimination, and on the finding of discrimination in four individual cases," (one of which it vacated) and that "the question of whether Teletype engaged in widespread discrimination, or merely a few isolated illegal acts, remains open." 648 F.2d at 1136. It thus concluded the injunction was premature and should be vacated. The court of appeals nevertheless affirmed the finding of class-wide discrimination based on disparate treatment[2] of blacks in demotions during the years 1974-76.

In affirming the class discrimination finding, the court of appeals rejected the statistical data of plaintiffs' and defendant's experts which directly dealt with demotions, not layoffs, and which refuted any discriminatory impact or treatment of blacks. It also declined to accept the role of collective bargaining seniority on demotions of blacks who, having come to the work force later, had less seniority. 648 F.2d at 1133-34. Instead the court of appeals based its affirmance on: (1) statistical evidence showing a difference between actual and expected number of black layoffs (not demotions) with a standard deviation of 2.28; (2) the findings in *Hoard* v. *Teletype Corp.,* 450 F. Supp. 1059 (E. D. Ark. 1978), that Teletype had practiced racial discrimination in certain *hiring* and *promotion* decisions and (3) the existence of a white supervisory force who considered subjective criteria in employment decisions.

---

[2] Subsequently in considering the individual cross-appeals the Court of Appeals stated "...the strength of the initial prima facie case finding... was not particularly strong here." 648 F.2d at 1137.

Petitions for rehearing were denied by entry of an Order on Rehearing on June 5, 1981. Petitioner seeks review of the opinion of the court of appeals as to the findings of class-wide liability, the findings of individual liability in favor of plaintiffs Taylor and Peyton and intervenor Harris and as to the proper standard of proof applicable to the claims of intervenor Bibbs and the twenty-seven class members.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the decision sought to be reviewed is in conflict with previous decisions of this Court and of other courts of appeals which prescribe the parameters and requirements of the plaintiffs' burden of proof in a class action alleging purposeful racially discriminatory employment practices. Moreover, such decision is in conflict with itself and at least one other decision by the eighth circuit court.

The court of appeals affirmed the finding of class discrimination based on disparate treatment of blacks in demotions. Contrary to such finding, the evidence directly related to demotions negated any disparate impact or treatment of blacks. The expert testimony on demotion statistics presented by *both* plaintiffs and defendant demonstrated the *absence* of any adverse impact or treatment. The district court found no discrimination in demotions as to all but four of the plaintiffs-intervenors and the court of appeals reversed the finding in favor of one of the four. The district court expressly found no showing of a conscious effort to harm blacks in demotions - a critical element in a disparate treatment case. The court of appeals, however, reasoned that this finding of the district court should not be construed as a finding but rather as an expression of "belief by the district court that no direct evidence of conscious or malicious racial animus had been presented." 648 F.2d at 1133 n. 7. The court of appeals vacated as premature the injunction granted by the district court stating the injunction rested on relatively weak evidence of class-wide discrimination and that the question of whether Teletype had engaged in widespread discrimination or merely on isolated illegal acts remained open.

With the state of the evidence in this posture the court of appeals nevertheless affirmed the class finding of disparate treatment of blacks in demotions. It did so on the basis of evidence which it itself characterized as "circumstantial" and not "particularly strong," consisting of layoff (not demotion) statistics, the results in a prior discrimination case which did not deal with demotions, *Hoard* v. *Teletype, supra,* and the existence of an all white supervisory force. An examination of such evidence reveals that it does not support the finding and that such finding was clearly erroneous and should not have been sustained. Fed. R. Civ. P. 52 (a).

Layoff statistics do not constitute proof of intent to discriminate in demotions. Moreover, the layoff statistics were borderline at best, rested on a defective data base, and were viewed by the court of appeals as neither sufficient "standing alone to support a prima facie case," nor of "the magnitude that clearly demonstrates intentional discrimination." 648 F.2d at 1135 n. 13.

The *Hoard* case involved alleged discrimination in promotions, not demotions, and while it found against Teletype in promotions to four job categories, it absolved the Company as to all other categories and expressly found no discrimination in discharges of blacks (which would seem more analogous to layoffs than to demotions thereby further weakening any inference of discrimination based on the layoff statistics). *See* 648 F.2d at 1132 n. 3.

Since no adverse impact in black demotions was shown, the existence of an all white supervisory force and subjective decision-making do not, standing alone, rise to establish a case of disparate treatment.

Having inferred from the foregoing the existence of class-wide disparate treatment, the court of appeals further inferred a presumption of discrimination in favor of the individual plaintiffs-intervenors.

It is submitted that the court of appeals erroneously sustained the class-wide discrimination finding and erroneously applied a presumption in favor of the individual plaintiffs-intervenors and the class members whose claims remain to be heard and that a writ of certiorari should issue to review its opinion and judgment.

The Court Of Appeals' Affirmance Of The Class-Wide Discrimination Finding And Its Vacation Of The Injunction Rest On Inconsistent Rationales And The Former Holding Cannot Be Reconciled With The Requirements In *Teamsters*.

In *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977), this Court held that when the government alleged an employer had engaged in a pattern or practice of Title VII violations, that it "ultimately had to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." 431 U.S. at 336. The Court also observed that the "pattern or practice" language in §707(a) of Title VII was not intended as a term of art but that the words reflect their usual meaning, i.e., "single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice." 431 U.S. at 323 n. 16, citing 110 CONG. REC. 14270 (1964). In *Teamsters,* this Court sustained the finding of purposeful class discrimination against minority applicants for the position of line driver on facts far different from those in this case. Minorities occupied very small percentages of the company's work force. Only 0.4% of the line drivers were black and only 0.3% of the line drivers were Spanish-surnamed Americans and all of those had been hired after the litigation was commenced; with one exception, no black had been hired as a line driver until 1969; the hiring terminals were located in geographical areas with substantial minority populations and an overwhelming percentage of the company's minority employees held menial, low-paying positions. In addition, the government "bolstered" its statistical evidence with testimony recounting over 40 specific instances of discrimination. 431 U.S. at 337-38.

In addressing the injunction issue in this case, the court of appeals below stated:

> "The issuance of the injunction rested on relatively weak, although sufficient, evidence of classwide discrimination, and on the finding of discrimination in four individual cases. Weighing these findings against the finding of no discrimination for the three years immediately preceding the injunction, we have serious doubt as to the appropriateness of this kind of relief. We need not finally determine the propriety of the permanent injunction in this appeal, however, for the district court has yet to decide many of the individual claims for relief. Until those cases are decided, *the question of whether Teletype engaged in widespread discrimination, or merely a few isolated illegal acts, remains open*. This incomplete record will not justify permanent injunctive relief at this time. We, therefore, vacate the injunction." 648 F.2d at 1136 (footnotes omitted, emphasis added).

Petitioner here submits that if in fact the class representatives have not demonstrated, after a full trial on the liability issue, that more than "merely a few isolated illegal acts" have occurred, then the court of appeals should have held for Teletype on the class demotion issues and, at most, entered judgment for the three individuals whose demotions had not been adequately explained. The purpose of the second stage of a Title VII proceeding is to determine which individuals have been "victims" of proven class discrimination and not to establish whether class discrimination did in fact exist. When plaintiffs cannot establish the pattern or practice of purposeful discrimination and the existence of a significant number of class members who "possess the same interest and suffer the same injury," *see East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395 (1977), at the liability stage, then class issues must be resolved in favor of the employer. That is the clear holding of *Teamsters*.

Other courts of appeals have clearly recognized the "isolated acts" doctrine and have required a showing of systemic discrimination in connection with the particular employment practice challenged. *Wade* v. *Mississippi Cooperative Extension Service,* 528 F.2d 508 (5th Cir. 1976); *Wright* v. *National Archives and Records Service,* 609 F.2d 702 (4th Cir. 1979). *See also Booth* v. *Board of Directors,* 475 F. Supp. 638 (E. D. La. 1979). In fact, another panel of the eighth circuit has so held. *See Inmates of Nebraska Penal Complex* v. *Greenholtz,* 567 F.2d 1368, 1381 (8th Cir. 1977) ("...two or three individual cases [of individual discrimination] are insufficient to provide more than minimal support to an inference of class-wide purposeful discrimination.").

The Finding Of Class-Wide Purposeful Discrimination Was Contrary To The Direct Evidence On Demotions And To The District Court's Finding That There Was No Showing Of A Conscious Effort To Harm Blacks In Demotions. It Rested Instead On "Weak" and "Circumstantial" As Well As Unrelated Evidence And Should Not Have Been Sustained.

The issue in this case was *demotion* practices. Both parties presented statistical evidence of a standard deviation analysis *(see Castaneda* v. *Partida,* 430 U.S. 482 (1977) and *Hazelwood School District* v. *United States,* 433 U.S. 229 (1977)) of the numbers of blacks and whites demoted. Both experts agreed that their analyses furnished no basis for an inference of disparate impact or treatment of blacks. The standard deviation difference as to demotions introduced into the record was computed at 1.403 by defendant (and .957 by the plaintiffs) and hence, under *Hazelwood, supra,* any difference in the ratio or numbers of blacks demoted was so small that it could be explained by random chance. In fact, the district court found that "a standard deviation of 1.403 is well below the level mentioned by the Supreme Court [in *Hazelwood*] so Dr. Drane's evidence indicates when considered alone, *that actual black demotions* *did not deviate from expected black demotions sufficiently to ground a reasoned inference of discrimination.*" 475 F. Supp. at 962. Out of sixteen individuals who testified and attempted to prove specific individual discriminatory demotions, the district court accepted only four and the court of appeals vacated one of those findings. Thus, out of 1132 demotions (including 301 black demotions) only three were not satisfactorily explained by Teletype. 475 F. Supp. at 961.

In spite of the foregoing direct evidence on demotions establishing the absence of adverse treatment or impact, the district court and the court of appeals both relied on abstract and conjectural factors, having no direct relationship to demotions and which the court of appeals characterized as "circumstantial" and "weak", to sustain the class liability finding.

First, in its opinion of May 1, 1981, the court of appeals states that this case is not one of disparate impact but rather that the district court properly viewed these claims as alleging discriminatory treatment and concluded that Teletype had subjected the class of black employees to different treatment regarding demotions. It is submitted that the opinion of the district court cannot properly be read as substantiating a case of liability based on disparate treatment and that the court of appeals' decision so interpreting it was clearly erroneous.

The distinction between treatment and impact theories of liability has recently been discussed in *Stastny* v. *Southern Bell Tel. & Tel. Co.,* 628 F.2d 267 (4th Cir. 1980). The court there observed as follows:

> "Central to both theories of liability where class-wide sex (as other) discrimination is alleged is the existence of an identifiable employment pattern, practice, or policy that demonstrably affects all members of a class in substantially, if not completely, comparable ways. In disparate treatment theory, this is the 'pattern or practice,' followed as

> an employer's 'regular or standard operating procedure,' which so demonstrably treats women in relatively unfavorable ways that it justifies a rebuttable inference that it proceeds from an intention to treat them differently simply because of their sex. *See Teamsters* v. *United States*, 431 U.S. 324 (1977). In disparate impact theory, it is the practice or policy which, though demonstrably neutral or even benign in any sex-related intent, nevertheless bears with disproportionately adverse impact and without any justification of business necessity upon women. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)."

628 F.2d at 273. *Stastny* also noted that:

> "Because in any Title VII case either, or indeed both, theories may support a determination of liability depending upon the actual proof, the class action inquiry must take both into account. See *Teamsters* v. *United States*, 431 U.S. 324, 335 n. 15 (1977)."

Id.

The district court here expressly found that there was "no showing that the disparate impact of layoffs and demotions in 1975 was the result of a conscious effort to harm blacks as such."[3] 475 F. Supp. at 964. While the court of appeals recognized that this statement could "free Teletype from liability under the discriminatory treatment theory because proof of discriminatory motivation is essential to establish such a claim," (648 F.2d at 1133), it simply misconstrued the district court's finding, explaining that it did not constitute a finding but

> "[r]ather, in light of the opinion as a whole, we believe that the Court merely expressed its belief that *no direct evidence of conscious or malicious racial animus had been*

---

[3] See pages 16 and 17, *infra*.

> *presented.* The Court found, and we agree, that sufficient evidence existed to allow the Court to make the necessary inference of discriminatory racial motivation." 648 F.2d at 1133 n. 7 (emphasis added).

The court of appeals thus in effect "explained away" a direct finding by the district court of the absence of an intent by Teletype to treat blacks differently as to demotions which—under the *Teamsters* and *Stastny* cases—would expressly negate a disparate treatment case. That casual interpretation of the district court's finding simply cannot pass muster in light of other observations by the district court which support a conclusion that it in fact found no purposeful discrimination. The lower court observed that to the extent blacks were "harder hit by layoffs," it was because they "had come to the work force late" and consequently had less seniority. 475 F. Supp. at 963. *See also* the discussion in 475 F. Supp. at 965 n. 2, where the district court with regard to claims of two class members held as follows:

> "Messrs. Donley and Kennard have not sustained the burden of showing purposeful discrimination, which is an element of a 1981 claim, as distinguished from Title VII."

The district court then found with regard to the actions concerning these employees that "[t]his Court is unable to say that this judgment was infected by conscious racial motives." *Id.* at 965. These findings are irreconcilable with the any "inference" of purposeful discrimination.

Second, petitioner submits to this Court that previous findings that Teletype has engaged in racially discriminatory employment practices *other than demotions* cannot be utilized to sustain plaintiffs' burden to demonstrate the existence of class-wide intentional racially discriminatory demotion practices. While it is true that *Hoard* v. *Teletype Corp.,* 450 F. Supp. 1059 (E. D. Ark. 1978) found Teletype had discriminated in the promotion of blacks to four job categories, it absolved Teletype of discrimination in promotions to all other job categories. Further, it expressly found no discrimination in Teletype's discharge practices.[4] 648 F.2d at 1132 n. 3.

An employer who is found to have discriminated in a limited aspect of its employment practices and absolved as to all others should not forever be saddled with a presumption that he intentionally discriminates in other, unrelated types of employment practices. Plaintiffs in a class disparate treatment demotion case are required to demonstrate the existence of class-wide intentional racially discriminatory demotion practices which adversely affected them. Moreover, plaintiffs should not be relieved of the burden of demonstrating the existence of a class of persons who "possess the same interest and suffer the same injury." *East Texas Motor Freight, Inc.* v. *Rodriguez,* 431 U.S. 395 (1977). Such was not the case here.

Third, it is submitted that the court of appeals misapplied relevant principles of law when it determined that statistical data on layoffs assists plaintiffs in demonstrating purposeful, class-wide discrimination in demotion practices. This is especially true where the only statistical evidence as to *demotions* presented by experts for both parties demonstrated the *absence* of adverse impact or treatment of blacks. In fact, the statistical evidence of black demotions revealed standard deviation differences of 1.403 and .957, considerably less than the more than two or three standard deviations required by this Court in

---

[4] The district court and the court of appeals relied on admittedly weak layoff statistics to support the finding of discrimination as to demotions by drawing an anology between layoffs and demotions. Surely there would seem to be more of an anology between layoffs and discharges as to which *Hoard, supra,* found no discrimination thereby further weakening any inference of discrimination drawn from the layoff statistics. Moreover, *Hoard* found no discriminatory employment practices as to most of the job categories involved in this class action. 648 F.2d at 1132 n. 3.

Hazelwood, supra, as proof of discrimination. *See* in this connection the observation in MORRIS, CURRENT TRENDS IN THE USE AND MISUSE OF STATISTICS IN EMPLOYMENT DISCRIMINATION LITIGATION 47 (2d ed. 1978):

> "Despite these admonitions, uncritical acceptance of statistical proofs has been more the rule than the exception. Nevertheless, in certain more careful decisions, Courts have considered whether the statistical proofs presented were properly tailored to the specific allegations presented, so that any inferences drawn would be relevant to and probative of the alleged discrimination."

See Rich v. *Martin Marietta Corp.,* 522 F.2d 333 (10th Cir. 1975) (Data should "comport to the specific issues presented"); *Rios* v. *Enterprise Association,* 501 F.2d 622 (2d Cir. 1974) (In considering a remedial hiring quota, the court stated "from the outset, the court should be guided by the most precise standards and statistics available"). *See also Olson* v. *Philco-Ford,* 531 F.2d 474 (10th Cir. 1976) where the plaintiff alleged discrimination against women in promotions and the court found that "the record contains no statistics bearing on promotions."

The applicable case law on the proper use of statistical data in Title VII cases simply does not permit the use of statistical data based on *layoffs,* and *not demotions,* to suffice, along with other evidence which the court of appeals itself characterizes as "circumstantial" and "weak," to show a class-wide, purposeful scheme of discriminatory demotions. This is especially true where the evidence presented by both plaintiffs' and defendant's experts *was* specifically tailored to demotions and rebutted contentions of discriminatory treatment or impact.[5]

---

[5] The court of appeals also referred to "subjectivity" in the decisions of white supervisors on employment matters. However, it is clear that subjectivity per se is not evidence of a violation of Title VII. *See Heagney* v. *University of Washington,* 642 F.2d 1157 (10th Cir. 1981); *Harris* v. *Anaconda Aluminum Co.,* 479 F. Supp. 11 (D. C. Ga. 1979).

Moreover, the court of appeals abused its discretion with respect to its reliance on statistical data as to layoffs when it observed:

> "The class presented a year-by-year break-down, albeit in layoffs, that show discrimination for some years and not for others. Had Teletype presented a yearly analysis of demotions showing no discrimination in any of the years, we might agree that a finding of discrimination would not be justified. We find nothing in the Company's evidence, however - giving results only for the overall five and one-half year period - to contradict the Court's finding that for certain of the years (1974 through 1976) a discriminatory pattern of demotions existed." 648 F.2d at 1134.

The court plainly misunderstood the nature of plaintiffs' evidence. Dr. James, plaintiffs' witness, totaled the results from EEO-1 Reports for the years 1974 through 1976 to arrive at a figure of employees eligible for layoff during this period. Based on the number of actual layoffs, he concluded that with a standard deviation difference of 2.28, it was statistically significant. In actuality, there were no layoffs in 1974 and the district court found that the greater number of layoffs occurred in 1975, not in 1976. 475 F.Supp. 958, 962. Thus, the court in effect permitted plaintiffs to use layoff statistics in one year (1975) to show purposeful, class-wide discrimination in demotions for a three-year period, the very thing for which the court of appeals criticized defendant's demotion statistics. Moreover, the court's action in this regard was in spite of the express finding by the district court that there was "no showing that the disparate impact of layoffs and demotions in *1975* was the result of a conscious effort to harm blacks as such."[6] 475 F. Supp. at 964 (emphasis added). Yet 1975 was the very year in which the layoffs occurred that were relied upon by the district court and the court of appeals to infer discrimination as to demotions for 1974, 1975 and 1976.

---

[6] The district court also expressly found no discrimination in demotions after 1976. 475 F. Supp. 958, 964.

Furthermore, not only was it improper to rely on layoff statistics to establish discrimination in demotions, but the layoff statistics were themselves riddled with infirmity. The data base improperly included supervisory personnel in one part of the equation but not the other. Although the district court and the court of appeals did not consider this flaw to sufficiently distort the results (648 F.2d at 1134), the court of appeals noted regarding the layoff statistics "that the disparity, although statistically significant, is not of the magnitude that clearly demonstrates intentional discrimination. Indeed, the district court was not compelled to accept the evidence standing alone as establishing a prima facie case and did not do so in this case." 648 F.2d at 1135 n. 13. Correcting that data base flaw would have made the already borderline statistics even less significant.

It is also important to note that no plaintiff or intervenor was laid off. The court of appeals' rationale is simply not consistent with the principle set forth in *Rodriguez, supra,* that class members must demonstrate that they have the "same interests and were subject to the same injury." If anything, a layoff is more anologous to a discharge and as observed by the court of appeals, the *Hoard* court expressly found Teletype did not discriminate against blacks in discharges. 648 F.2d at 1132 n. 3. The use of layoff statistics in a demotion class action is as illogical as using promotion statistics in a hiring class action. Layoffs create the opening to which employees may be downgraded just as promotions may create the openings for which applicants are hired. Where business conditions dictate a force reduction, a portion of the work force is laid off. The shifting of personnel to fill the remaining work positions then results in some demotions. This is clearly reflected in the collective bargaining agreement which covers the hourly workers here involved.

The class here consists of workers who were demoted, not laid off. Furthermore, assuming arguendo that layoffs were a "surrogate" for demotions as the court of appeals found, plaintiffs had the burden of producing a study showing a statistically significant deviation for the entire group, not merely the layoff segment of the group. This plaintiffs did not do and could not do. Accordingly, a writ of certiorari should issue to review the court of appeals' affirmance of the class-wide liability findings.

The Opinion Below Improperly Distorted The Burden Of Proof Principles Prescribed By This Court In Texas Department of Community Affairs v. Burdine, 450 U.S. ____, 67 L.Ed.2d 207 (1981)

With regard to the individual claims of Taylor, Peyton and Harris, the court of appeals affirmed the district court's finding of discrimination on the theory that the principles of *Texas Department of Community Affairs* v. *Burdine, supra,* were inapplicable because the district court's "class-wide finding," established Teletype as a "proven wrongdoer." As petitioner has demonstrated, this conclusion was based on inference based upon inference and should not be permitted to stand.

The court of appeals proceeded on the basis that such individuals should be presumed to be victims of that policy unless the employer proved otherwise. As petitioner's arguments demonstrate, the class discrimination finding was in direct conflict with the evidence on demotions and was erroneously sustained, primarily on an inference drawn from layoff statistics which aside from being unrelated to demotion issues were inaccurately based and too weak, standing alone, to support a prima facie case of discrimination. It was from this inference of class discrimination that the court of appeals further inferred the presumption in favor of individual class members. Shifting to the defendant the burden of proof, which under *Burdine* remains on the plaintiffs at all times, should not be permitted where, as here, the underlying inference of class discrimination is not supported by the evidence. Further, at the liability stage of a Title VII class action, plaintiffs and intervenors should have been required to satisfy the *Burdine* requirements.

CONCLUSION

For the foregoing reasons, and in view of the conflict between the opinion below with the holdings of this Court in *Teamsters, Rodriguez* and *Burdine, supra,* and the opinions of other courts of appeals, a writ of certiorari should issue to review the opinion of the Court of Appeals for the Eighth Circuit as to the findings of class-wide discrimination, individual liability in favor of plaintiffs Taylor and Peyton and intervenor Harris and as to the standard of proof applicable to the claims of intervenor Bibbs and the twenty-seven individual class members.

Respectfully submitted,

G. ROSS SMITH
1215 Tower Building
Little Rock, AR 72201
(501) 376-6604

JAMES M. STAULCUP, JR.
5555 Touhy Avenue
Skokie, IL 60077
(312) 982-3090

Counsel for Petitioner

APPENDIX

APPENDIX

Page

A. Opinion, *Taylor* v. *Teletype Corp.*, 648 F.2d 1129 (8th Cir. 1981) (the opinion sought to be reviewed) A-1

B. Opinion, *Taylor* v. *Teletype Corp.*, 475 F. Supp. 958 (E. D. Ark. 1979) A-23

C. Order, *Taylor* v. *Teletype Corp.*, 478 F. Supp. 1227 (E. D. Ark. 1979) A-51

D. Judgment and Opinion, *Taylor* v. *Teletype Corp.*, 492 F. Supp. 405 (E. D. Ark. 1980) A-59

E. Opinion, *Hoard* v. *Teletype Corp.*, 450 F. Supp. 1059 (E. D. Ark. 1978) A-68

F. Order denying rehearing, U. S. Court of Appeals, Eighth Circuit, June 3, 1981 .... A-86

G. Order and Opinion on rehearing, U. S. Court of Appeals, Eighth Circuit, June 15, 1981 .... A-87

H. Other Subsidiaries and Affiliates A-92

APPENDIX A

Tommie W. Taylor, Et Al.,
Appellees

vs.

Teletype Corporation,
Appellant

Tommie W. Taylor, Et Al.,
Appellants

vs.

Teletype Corporation,
Appellee

79-2027, 80-1681 and 80-1658

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Submitted January 14, 1981

Decided May 1, 1981

As Corrected on Denial of Rehearing

June 15, 1981

Before BRIGHT, STEPHENSON and McMILLIAN, Circuit Judges.

BRIGHT, Circuit Judge.

Tommie Taylor and Larry Peyton brought this action against Teletype Corporation (Teletype or the Company) alleging racial discrimination in the demotion of Company employees, in violation of Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e *et seq.* (1976). The district court permitted fourteen individuals to intervene and certified a class, comprised of all black employees who were demoted after February 28, 1974, designating these intervenors and the two named plaintiffs as the class representatives.

On August 29, 1979, the district court[1] determined that appellees had established a prima facie case of classwide discrimination for the years 1974 through 1976 but had failed to prove discrimination for the years 1977 through 1979. *Taylor* v. *Teletype Corp.*, 475 F.Supp. 958 (E.D.Ark.1979). The district court also resolved the claims of the sixteen class representatives, finding discrimination in four of the cases. By its order of November 2, 1979, the court issued a permanent injunction against Teletype and ordered reinstatement of the four successful individuals with backpay. *Taylor* v. *Teletype Corp.*, 478 F.Supp. 1227 (E.D.Ark.1979). On June 27, 1980, the court entered judgment on the individual claims and made certain awards of backpay, reinstatement, and attorney's fees. *Taylor* v. *Teletype Corp.*, 492 F.Supp. 405 (E.D.Ark.1980).

In No. 79-2027, an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1), Teletype challenges the injunction and the findings of discrimination in the class and individual claims. In No. 80-1681, Teletype appeals the individual relief awarded to Tommie Taylor and Larry Peyton and the award of attorney's fees. Four of the unsuccessful individual claimants cross-appeal in No. 80-1658. We affirm the district court findings regarding discrimination in the class and individual claims in all but one case, vacate the permanent injunction, and remand for further proceedings.

---

[1] The Honorable Richard S. Arnold, then serving as United States District Judge for the Eastern District of Arkansas.

1. *Background.*

The court and the parties accepted the findings of fact and conclusions of law in the related case of *Hoard* v. *Teletype Corp.*, 450 F.Supp. 1059 (E.D.Ark.1978). That decision, therefore, forms the backdrop for this litigation.

The *Hoard* opinion, as well as the findings by Judge Arnold, detail a history of deliberate racial discrimination by the Company, beginning with Teletype's opening of the Little Rock plant in 1957. Although the law did not provide sanctions against such conduct before July 2, 1965, the effective date of the Civil Rights Act, Teletype continued to discriminate long after that date. At least until 1971, the Company continued to discriminate in hiring for certain entry level jobs.[2] Through 1974, the Company continued to discriminate in hiring for professional and supervisory positions and, through 1977, in promotions to positions above grade 96 and to supervisory positions. At the time of the *Hoard* trial, no black had ever served in an upper-level management position at the Little Rock plant, a category that included one vice president, two managers, three assistant managers, and twenty-two department chiefs. For the years 1971 through 1977, the period covered in the *Hoard* litigation, the trial judge found that Teletype had discriminated in the promotion of blacks to certain jobs, but that plaintiffs had failed to establish discrimination in other job promotions or in the Company's discharge practices.[3]

---

[2] Teletype classifies jobs by a series of two-and three-digit numbers. Hourly-wage positions, generally held by employees covered by the collective bargaining agreement, start with grade 91 and continue through 98. Salaried employees start with grade 903 and continue up to grade 910. Other craft and management personnel positions are denoted by a variety of miscellaneous job categories.

[3] The court held that Teletype had discriminated in promotions to grade 97, grade 98, section chief, and department chief. Teletype, however, successfully rebutted charges of discrimination in the pro-

The present litigation concerns Teletype's allegedly discriminatory *demotion* practices. As certified by the district court, the class includes:

> Those black employees of the defendant who were demoted on or after February 28, 1974, including both bargaining-unit and non-bargaining-unit employees, and including those persons still employed by defendant and those employees no longer employed by defendant. [*Taylor* v. *Teletype Corp., supra,* 475 F.Supp. at 961.]

As previously noted, the court held that plaintiffs had succeeded in establishing a prima facie case of discrimination for the years 1974 through 1976, but had failed to prove discrimination for the years 1977 through 1979. Pursuant to these findings, Judge Arnold issued an injunction and instituted a procedure for individual members of the class to establish their entitlement to relief. The court also made specific findings regarding the sixteen individual claims of the named plaintiffs and the intervenors, granting relief in four cases but dismissing the remaining twelve.

On appeal, Teletype contends:

> 1) That the trial court's finding that plaintiffs established a prima facie case of discrimination rests on errors of law and clearly erroneous findings of fact;
>
> 2) That the court abused its discretion in permanently enjoining defendants from discriminating on the basis of race;

---

motion of blacks to: grade 96, trade groups I and II, grades 505-510 (equivalent of 905-910), job setters and machine setters, engineering associates (EA), and certain ungraded positions (UG1, 2, 3—Administrative Employees). The district court there also held that plaintiffs had not established a prima facie case of classwide discrimination respecting discharge practices for the period under consideration. *Hoard* v. *Teletype Corp., supra,* 450 F.Supp. at 1065-66.

3) That the court erred in finding that the Company failed to rebut the claims of employees Taylor (second demotion),[4] Peyton, Bibbs, and Harris; and

4) That the court abused its discretion in ordering greater relief to Taylor and Peyton than was permissible under the evidence.

On their cross-appeal, plaintiffs challenge the court's finding that Teletype did not discriminate in the demotions of Virginia S. Burke, Earl Jones, and William James Walker and in Taylor's first demotion.

II. *Classwide Discrimination.*

We first consider the challenge to the district court's conclusion that the class established a prima facie case of discrimination.[5] Essentially, Teletype argues that the district court's finding rested on insufficient evidence. We do not agree and therefore affirm the court's finding of classwide discrimination.

Teletype incorrectly views the district court's finding of discrimination as resting upon the *Griggs* theory of disparate impact.[6] The district court properly viewed these claims as alleging discriminatory treatment. Accordingly, the court considered relevant factors and concluded that Teletype had subjected the class of black employees to different treatment than white employees regarding demotions because of their race.[7] Our review of the record discloses sufficient evidence to support the court's finding of classwide discrimination. We turn now to an analysis of the relevant evidence on this issue produced at trial.

---

[4] As will be discussed below, the court found discrimination in Taylor's second demotion, but not in her first.

[5] In reviewing the grant of an injunction under 28 U.S.C. § 1292(a)(1), we have jurisdiction to consider the merits of all issues already tried and determined. *See Gaines* v. *Sunray Oil Co.*, 539 F.2d 1136, 1140 (8th Cir. 1976); *McNally* v. *Pulitzer Publishing Co.*, 532 F.2d 69, 74 (8th Cir.), *cert. denied,* 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131 (1976); 9 *Moore's Federal Practice* ¶ 110.25[1] (1980). Here, in particular, we should exercise plenary jurisdiction because of the interrelationship between the injunction and the other issues.

---

[6] A *Griss*-type case challenges facially neutral standards that affect employees in a significantly discriminatory pattern. *See e. g., Dothard* v. *Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977) (height and weight requirements); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975) (standardized tests); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971) (high school diploma and standardized test). Here, plaintiffs do not challenge objective criteria; rather, they allege improper use of subjective procedures for demotions.

[7] Some confusion may stem from the district court's statement that

> [t]here is no showing that the disparate impact of layoffs and demotions in 1975 was the result of a conscious effort to harm blacks as such. [*Taylor* v. *Teletype Corp., supra,* 475 F.Supp. at 964.]

This statement, if construed as a finding, could serve as a possible basis to free Teletype from liability under the discriminatory treatment theory because proof of discriminatory motivation is essential to establish such a claim. *See International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977); *Kirby* v. *Colony Furniture Co., Inc.,* 613 F.2d 696, 702 (8th Cir. 1980); *Marshall* v. *Kirkland,* 602 F.2d 1282, 1299 (8th Cir. 1979).

We do not, however, construe this statement as an ultimate finding of no racial motivation on the part of Teletype. Rather, in light of the opinion as a whole, we believe that the court merely expressed its belief that no direct evidence of conscious or malicious racial animus had been presented. The court found, and we agree, that sufficient evidence existed to allow the court to make the necessary inference of discriminatory racial motivation.

The court in part rested its finding on statistical evidence of layoffs, which suggested that a racially discriminatory pattern of layoffs existed for the years 1974 through 1976. During those years, according to appellees' statistician, Dr. Frank A. James, blacks accounted for 24.7 percent of those laid off, but only 20.4 percent of the work force. The demonstrated difference between the actual and expected number of blacks laid off yielded a standard deviation of 2.28,[8] within the two-to-three deviation figure suggested by the Supreme Court as acceptable statistical proof of discrimination.[9] *Hazelwood School District* v. *United States,* 433 U.S. 299, 308-09 n.14, 97 S.Ct. 2736, 2741-42 n.14, 53 L.Ed.2d 768 (1977). *See also Hameed* v. *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 396,* 637 F.2d 506, 512-14 & nn. 8 & 9 (8th Cir. 1980).

Numbers must be statistically significant before one can properly conclude that any apparent racial disparity results from some factor other than random chance. If the disparity is established as statistically significant and race is the only evidence variable separating the two groups, a court may infer that racial considerations are responsible for the results. The size of the disparity affects only its probative weight. The defendant may, of course, explain the disparity by showing that some factor other than race, such as a bona fide seniority system, caused the demonstrated difference.

---

[8] This result indicates statistically a likelihood of only one or two percent that pure chance was responsible for the demonstrated racial disparity.

[9] The Supreme Court noted that the standard deviation method was not the only way of using statistics to show the likelihood of discrimination. *Hazelwood School District* v. *United States,* 433 U.S. 299, 311-12 n.17, 97 S.Ct. 2736, 2743 n.17, 53 L.Ed.2d 768 (1977).

An alternative approach, suggested by the EEOC, indicates that a 95-percent level of confidence is statistically significant. *See also Hazelwood School District* v. *United States, supra,* 433 U.S. at 318 n.5, 97 S.Ct. at 2747 n.5 (Stevens, J., dissenting). The figures here are well within that level of confidence.

In this appeal, Teletype challenges the relevance of the layoff statistics, as well as the accuracy of plaintiffs' data base. As a defense, Teletype asserts that it demoted workers according to a bona fide seniority system.

[1] Teletype first argues that layoff statistics are not relevant to the class's claim of discriminatory demotions. The district court found that the layoff figures serve as a suitable surrogate for demotions, because a layoff is itself a demotion and many of those laid off had been demoted first and later dismissed because they could not be placed after the demotion. Article 28 of the collective bargaining agreement also demonstrates some connection between the two.[10] Any lack of correlation between demotions and layoffs affects the probative weight of these statistics, rather than their relevance. Teletype has not demonstrated the irrelevancy of this evidence by showing that no relationship exists between layoffs and demotions. *See Detroit Police Officer Ass'n* v. *Young,* 608 F.2d 671, 687 (6th Cir. 1979), *appeal docketed,* No. 79-1080 (U.S. Jan. 10, 1980). We find no error in the district court's consideration of these statistics as relevant evidence.

Teletype introduced its own statistical evidence regarding demotions for 1974 through 1979.[11] These statistics show no significant disparate treatment between whites and blacks over these years. Teletype contends that the district court improperly ignored these statistics, the evidence most relevant to demotion practices. The district court, however, did not ignore these statistics; rather it deemed them insufficiently refined to negate the statistical showing of discrimination for part of the period under consideration. The class presented a year-by-year breakdown, albeit in layoffs, that showed discrimination for some years and not for others. Had Teletype presented a yearly analysis of demotions showing no discrimination in any of the years, we might agree that a finding of discrimination would not be justified. We find nothing in the Company's evidence, however,—giving results only for the overall five and one-half year period—to contradict the court's finding that for certain of the years (1974 through 1976) a discriminatory pattern of demotions existed.

---

[10] Paragraph 3 of article 28 details the procedures for downgrades and layoffs. A worker selected for a downgrade becomes a surplus employee and may in line with certain procedures, displace an employee down the scale. Superior position, however, does not guarantee continued employment. Subparagraph 3.2 provides: "A surplus employee who cannot be placed in accordance with this paragraph 3 shall be LAID OFF."

Teletype also attacks the court's reliance on appellees' layoff analysis as clearly erroneous by challenging the accuracy of plaintiffs' data base. Defendant first questions the inclusion of supervisory personnel in the layoff statistics. The district court rejected this claim, finding that the number of supervisory employees was small and that no distortion was shown. We cannot conclude that this finding is erroneous. Teletype also claims inaccuracies due to the statistician's reliance on year-end work force reports when a more accurate analysis was available. The Company, however, makes no showing that the figures used produced inaccurate results or that a different result would have been reached had the statistician used a different population base. Statistics and statistical analysis should be treated like any other evidence in that the trial court, in the first instance, should resolve challenges to the conflicting assertions presented by the parties' respective experts and their supporting data. *See Hazelwood School District* v. *United States, supra,* 433 U.S. at 312, 97 S.Ct. at 2743. This court may not overturn the resulting findings unless a party demonstrates them to be clearly erroneous; appellant has failed to meet its burden here.

---

[11] This evidence might also be used to rebut the prima facie case. For reasons explained in the text, however, these statistics are insufficiently refined to preclude a finding of discrimination for a portion of the period under consideration.

As a defense, Teletype asserts that demotions, because determined pursuant to a bona fide seniority system, are protected under section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1976). The district court disagreed, finding that seniority does not control the making of demotions, relying on a *Hoard* finding to that effect and on article 28 of the collective bargaining agreement, which sets forth numerous subjective standards that supervisors may use to override the seniority system. We cannot characterize the trial court's finding as clearly erroneous.[12] The court could properly discount the testimony of Teletype's witness that seniority determines demotions as contrary to the written guidelines. In addition, the court could rely on the *Hoard* finding because, as Teletype's personnel chief explained, the process for downward movement merely mirrors the upward movement at issue in the *Hoard* litigation.

As recognized by the district court, the layoff statistics alone did not establish a prima facie case of discrimination because of the small statistical disparity[13] and the circumstantial nature of the evidence. The court, however, considered other relevant evidence in making its determination of a prima facie case. The court deemed the prior history of discrimination by Teletype to be especially relevant. It also took into consideration the subjective decisionmaking of the Company in its demotion practices and the existence of an all-white supervisory force, which made all demotion and promotion decisions. Although this evidence provides no direct proof that Teletype discriminated in making demotions, it bolsters the trial court's conclusion of discrimination. *See, e. g., Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 746 (8th Cir. 1980); *Fisher* v. *Proctor & Gamble Manufacturing Co.*, 613 F.2d 527, 546 (5th Cir.), *cert. denied,* ____ U.S. ____, 101 S.Ct. 929, 66 L.Ed.2d 845 (1980); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292, 1298 n.12 (8th Cir. 1978). From a review of the record, we conclude that the evidence cited by the district court, together with the layoff statistics and other miscellaneous evidence,[14] supports the prima facie finding of discrimination.

---

[12] The district court appropriately considered seniority as a defense to individual claims.

[13] We note, as did the district court, that the disparity, although statistically significant, is not of the magnitude that clearly demonstrates intentional discrimination. *Indeed,* the district court was not compelled to accept the evidence standing alone as establishing a prima facie case and did not do so in this case.

[2] We conclude that substantial evidence supports the district court's overall finding of classwide discrimination in the Company's demotion practices for the years 1974-76 and that the court's factual findings are not clearly erroneous. Accordingly, we affirm the classwide finding.

III. *Injunctive Relief.*

After finding that the class had established a prima facie case of discrimination, the district court issued a permanent injunction, ordering that

> Teletype Corporation be, and it is hereby, permanently enjoined from discriminating against any individual with respect to his or her compensation, terms, conditions, privileges of employment, or in any other manner, because of such individual's race. [*Taylor* v. *Teletype Corp., supra,* 478 F.Supp. at 1228.]

Teletype argues on appeal that the district court erred in issuing the injunction because of the court's finding that the defendant did not discriminate in making demotions after December 31, 1976.

---

[14] Evidence, such as Teletype's failure to live up to its affirmative action program and its failure to support its affirmative action director, is also relevant to discerning the Company's attitude regarding race.

[3,4] The parties recognize that once discrimination has been established in a Title VII action, the issuance of an injunction rests in the sound discretion of the district court, even if the employer has begun to comply with the law in good faith. *Carter* v. *Gallagher,* 452 F.2d 315, 324 (8th Cir. 1971), *cert. denied,* 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); *Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421, 429 (8th Cir. 1970). *Cf. Scotch Whiskey Ass'n* v. *Barton Distilling Co.,* 489 F.2d 809, 813 (7th Cir. 1973) (good-faith compliance with Lanham Trademark Act). In considering the grant of an injunction, the district court, of course, must consider voluntary efforts at correcting past discrimination, but such efforts do not preclude injunctive relief. *Harless* v. *Duck,* 619 F.2d 611, 618 (6th Cir.), *cert. denied,* ____ U.S. ____, 101 S.Ct. 212, 66 L.Ed.2d 92 (1980). *See also Campbell* v. *McGruder,* 580 F.2d 521, 541 (D.C.Cir.1978); *Gates* v. *Collier,* 501 F.2d 1291, 1321 (5th Cir. 1974); *Williams* v. *General Foods Corp.,* 492 F.2d 399, 407 (7th Cir. 1974). Although we cannot say at this point in the litigation that the district court abused its discretion, we nevertheless must order the permanent injunction vacated as prematurely granted.

The issuance of the injunction rested on relatively weak, although sufficient, evidence of classwide discrimination, and on the finding of discrimination in four individual cases.[15] Weighing these findings against the finding of no discrimination for the three years immediately preceding the injunction, we have serious doubt as to the appropriateness of this kind of relief.[16] We need not finally determine the propriety of the permanent injunction in this appeal, however, for the district court has yet to decide many of the individual claims for relief. Until those cases are decided, the question of whether Teletype engaged in widespread discrimination, or merely a few isolated illegal acts, remains open. This incomplete record will not justify permanent injunctive relief at this time. We, therefore, vacate the injunction.[17]

---

[15] *See* section IV *infra.*

[16] This case is not one involving the necessity of immediate preliminary injunctive relief.

IV. *Individual Claims.*

The district court found that Teletype failed to rebut the individual claims of Tommie Taylor, Larry Peyton, James Bibbs, and Joseph Harris. Teletype contends that the court erred in making such findings.

[5,6] Once a plaintiff establishes a prima facie case of classwide discrimination, the burden shifts to the employer to prove that the individual employment decision was free from that discrimination. As the Supreme Court has stated,

---

[17] In considering whether to order injunctive relief, the district court should note Teletype's objections about the breadth and vagueness of the injunction. The Company complains that the order is overly broad, as it covers all terms, conditions, and privileges of employment even though appellees challenged only demotion practices. *See EEOC* v. *Local 14, International U. of Operating Engineers,* 553 F.2d 251, 256 (2d Cir. 1977); *Davis* v. *Romney,* 490 F.2d 1360, 1370 (3d Cir. 1974). Teletype also contends that the injunction is inconsistent with the *Hoard* court's denial of an injunction concerning discharge practices and its grant of narrow relief affecting future promotions. *Hoard* v. *Teletype Corp., supra,* 450 F.Supp. at 1065-66. Lastly, Teletype questions the vagueness of the injunction, whose terms merely mirror the statutory language of Title VII. *See Payne* v. *Travenol Laboratories, Inc.,* 565 F.2d 895, 898 (5th Cir.), *cert. denied,* 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978). *But see also United States* v. *Miller,* 588 F.2d 1256, 1261 (9th Cir. 1978) (enforcing "obey the law" injunction in Interstate Commerce Act case), *cert. denied,* 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979). We recognize the difficulty of achieving a balance between an overly intrusive order, especially where an employer has voluntarily attempted to end discrimination in good faith, and an overly vague injunction, which provides insufficient notice of the conduct required to avoid contempt. We leave the determination of appropriate relief to the district court on remand.

> [t]he holding in *Franks* [v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444] that proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief is consistent with the manner in which presumptions are created generally. Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof. See C. McCormick, Law of Evidence §§ 337, 343 (2d ed. 1972); James, Burdens of Proof, 47 Va.L.Rev. 51, 61 (1961). See also *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 208-209 [93 S.Ct. 2686, 2697, 37 L.Ed.2d 548]. These factors were present in *Franks*. Although the prima facie case did not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it did create a greater likelihood that any single decision was a component of the overall pattern. Moreover, the finding of a pattern or practice changed the position of the employer to that of a proved wrongdoer. Finally, the employer was in the best position to show why any individual employee was denied an employment opportunity. [*International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 359-60 n.45, 97 S.Ct. 1843, 1866-67 n.45, 52 L.Ed.2d 396 (1977).][16]

---

[16] The recent Supreme Court's decision clarifying the burdens of proof in an individual "*McDonnell Douglas*" case of discrimination does not affect the allocation of burdens in a case of classwide discrimination. *See Texas Department of Community Affairs* v. *Burdine*, ____ U.S. ____, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

A *McDonnell Douglas* prima facie showing requires no proof of wrongdoing, but merely "raises an inference of discrimination only

Accord, Williams v. *Anderson,* 562 F.2d 1081, 1088 (8th Cir. 1977). In other words, "a company's general discriminatory practices [furnish] a strong inference that a particular applicant was rejected because of racial considerations, [but] such a presumption is not conclusive." *United States* v. *N. L. Industries, Inc.,* 479 F.2d 354, 371 (8th Cir. 1973). *See also Parham* v. *Southwestern Bell Telephone Co., supra,* 433 F.2d at 428.

In this case, the district court found that the plaintiffs established a prima facie case or classwide discrimination. Accordingly, we must consider whether the district court erred in concluding that Teletype failed to rebut the prima facie claims of the four individuals in question. The nature of evidence required to overcome the presumption of discrimination depends, of course, on the strength of the initial prima facie finding, which was not particularly strong here. We will proceed to consider each individual claim.

A. *Tommie Taylor.*

The district court concluded that Teletype had failed to rebut the case of discrimination in Taylor's demotion from grade 910 to 906 and subsequent layoff,[19] as the court found that there ex-

---

because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). *Accord, Texas Department of Community Affairs* v. *Burdine, supra,* ____ U.S. at ____, 101 S.Ct. at 1095. A case of classwide discrimination differs significantly. As noted in the text, a classwide finding establishes the employer as a proven wrongdoer who has maintained a discriminatory practice. Thus, a court may reasonably presume—unless the employer proves otherwise—that any class member was a victim of that policy.

[19] The court ruled that the demotion amounted to a layoff because Taylor's supervisor informed her that as a grad 906 she would have to operate a Bruning machine which the Company knew she could not operate for medical reasons.

isted "too many inconsistencies in the explanations offered to be convincing." *Taylor* v. *Teletype Corp., supra,* 475 F.Supp. at 968. Despite the Company's assertion that it demoted Taylor for economic reasons, the record contains sufficient evidence in support of the district court's refusal to accept the nondiscriminatory explanation offered by the Company. For example, Taylor was consistently rated as an excellent employee; she had previously been excused from operating the Bruning machine for medical reasons; Mr. Seamon, one of Taylor's supervisors, believed that Taylor would have had sufficient work in the department without being required to operate the Bruning machine. Of course, a court cannot require an employer to hire an individual incapable of performing the job. In this case, however, the district court remained unconvinced that Taylor received the downgrade and layoff because she could not operate the Bruning machine. We cannot conclude that this finding, which depended upon the court's judgment of the credibility of several witnesses, is clearly erroneous. We, therefore, affirm the judgment as to Taylor.

B. *Larry Peyton.*

The district court also found that Teletype had failed to rebut the prima facie case of discrimination in Larry Peyton's demotion from an engineering associate (EA) position. Again, the record contains substantial evidence to support the district court's conclusion.

Teletype failed to present a consistent explanation for the Company's decision to retain as EAs certain white individuals who had less seniority than Peyton. James Eldridge, the Company official most responsible for downgrades in Peyton's department, presented shifting defenses to justify various downgrade decisions. For example, when comparing Peyton to a white with less experience, Eldridge explained the decision on the basis of the "Rank Order"—a highly subjective rating system, but when comparing Peyton to someone with a lower

Rank Order position, Eldridge stated that he found specific experience to be critical in making the decision.

On the basis of any criteria suggested by Teletype, Peyton possessed greater qualifications than some of the engineers who suffered no demotion. We hold, therefore, that the district court did not err in determining that the employer failed to rebut the prima facie case.

C. *James Bibbs.*

The district court found that Bibbs had a satisfactory work record and that Teletype had failed to explain adequately its decision to demote Bibbs while retaining two white employees with less seniority.

Teletype contends that in demoting Bibbs, the Company was not choosing between a black worker and a white worker—in this case Oden or Ford—because Bibbs worked in a different department than the white employees.[20]

We cannot discern from the district court's opinion whether the court considered Teletype's explanation or, if it did, on what grounds the court rejected the nondiscriminatory defense asserted by the Company.[21] Therefore, we vacate the court's decision in Bibbs' claim and remand for further consideration.

---

[20] Because all three worked in grade 94 positions, Bibbs might have "bumped" one of the two if he had sufficient seniority over either one. Apparently, however, he did not have the three months of greater seniority required by the collective bargaining agreement as a prerequisite to "bumping." Bibbs' date of hire was October 14, 1968; Ford's was October 21, 1968; and Oden's was November 11, 1968.

[21] In fact, the findings do not indicate if Ford and Oden were the two whites to whom Bibbs was compared. An examination of defendant's exhibit 7, however, reveals no grade 94 stock selector/keeper with less seniority than Bibbs who was demoted during that period.

D. *Joseph Harris.*

The district court found that the Company had failed to present any substantial evidence to explain the downgrade of Harris from grad 95 to grade 94 on March 31, 1975.[22] We find no error in this conclusion. Teletype fails to cite any evidence tending to reubt the presumption established by the finding of classwide discrimination. Thus, we affirm the district court's judgment on Harris' demotion.

V. *Relief to Taylor and Peyton.*

A. Reinstatement of Tommie Taylor.

The district court ordered that Taylor be reinstated to a position as 910 PR representative or to a position comparable in salary, responsibility, creativity, and future opportunities. Teletype contends that the district court erred in ordering reinstatement because of the hostility engendered by the litigation, the court's credibility determinations made against Taylor, and the management-level position to which she would be reinstated.

[7,8] In a Title VII action, however, a court may deny reinstatement

> only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. [*Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975).]

Accord, Harper v. *General Grocers Co.,* 590 F.2d 713, 716 (8th Cir. 1979). To deny reinstatement to a victim of discrimination merely because of the hostility engendered by the prosecution of a discrimination suit would frustrate the make-whole purpose of Title VII. Antagonism between parties occurs as the natural biproduct of any litigation. Thus, a court might deny reinstatement in virtually every case if it considered the hostility engendered from litigation as a bar to relief.

---

[22] We note that the district court carefully considered and accepted Teletype's explanation for Harris' demotion from a 908 job. Harris does not appeal that decision.

The district court did express some concern over reinstatement of Taylor to a public relations position in light of certain adverse credibility findings made by the trial court.[23] The district court, however, determined that reinstatement should nonetheless be ordered. The court in fashioning a remedy permitted Teletype to exercise some flexibility in reemploying Taylor in a "comparable" position to that of public relations representative. We cannot conclude that the district court abused its discretion in mandating reinstatement and, therefore, affirm that order.[24]

---

[23] The district court credited the testimony of Teletype's witnesses over that of Taylor concerning Taylor's responsibilities in preparing the 1975 Affirmative Action Plan. *Taylor* v. *Teletype Corp., supra,* 475 F.Supp. at 966.

[24] Three cases cited by Teletype, although factually similar to this case, merely represent district courts acting within their discretion in denying reinstatement relief. *See Vant Hul* v. *City of Dell Rapids,* 462 F.Supp. 828, 834 (D.S.D.1978); *Combes* v. *Griffin Television, Inc.,* 421 F.Supp. 841, 847 (W.D.Okla.1976); *EEOC* v. *Kallir, Philips, Ross, Inc.,* 420 F.Supp. 919, 926-27 (S.D.N.Y.1976), *aff'd mem.,* 559 F.2d 1203 (2d Cir.), *cert. denied,* 434 U.S. 920, 98 S.Ct. 395, 54 L.Ed.2d 277 (1977). Here, the district court similarly acted within its discretion in fashioning a remedy.

Two other cases cited by Teletype concern plaintiffs who abused their positions of trust while employed. *Ayers* v. *Western Line Consolidated School District,* 555 F.2d 1309, 1322 (5th Cir. 1977), *rev'd on other grounds sub nom., Givhan* v. *Western Line Consolidated School District,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979); *Williams* v. *Boorstin,* 451 F.Supp. 1117, 1126-27 (D.D.C.1978). Here, a substantially different situation exists. Any impropriety of Taylor related to conflicting testimony, given years after the fact in the midst of litigation. The court found no misconduct related to job performance.

B. *Backpay for Larry Peyton.*

The district court ordered the Company to reinstate Peyton to the first available EA position and award him backpay until his reinstatement or until he rejects an offer of reinstatement. Teletype asserts that their liability for backpay should be cut off as of February 17, 1977, the date on which Teletype offered Peyton a new position as an EA.

[9] The failure to accept an offer of reinstatement does not automatically terminate an employee's right to relief.

> In determining whether the right to relief extends beyond the date of an offer of reinstatement, the trial court must consider the circumstances under which the offer was made or rejected, including the terms of the offer and the reasons for refusal. [*Claiborne* v. *Illinois Central Railroad,* 583 F.2d 143, 153 (5th Cir. 1978), *cert. denied,* 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303 (1979).]

Here, the district court found that Peyton reasonably rejected the offer because of doubts about job security, created at least in part by Teletype's original act of discrimination. We recognize that this portion of the remedial order presents a close question. In light of Peyton's continued diligent efforts to mitigate any loss of earnings,[25] however, we cannot say that the district court abused its discretion in ordering reinstatement with backpay. As the Third Circuit noted, the Supreme Court has emphasized

> the equitable nature of an award of back pay in cases under Title VII of the 1964 Civil Rights Act and the responsibility of the district court to decide each back pay controversy in a way calculated to achieve a just and

---

[25] The total backpay judgment through November 2, 1979, amounts to $663.22.

> equitable result in the circumstances of the csae before it. [*Jurinko* v. *Edwin L. Wiegand Co.*, 528 F.2d 1214, 1216 (3d Cir. 1975).]

Thus, we affirm the remedial order in Peyton's case.

VI. *Attorney's Fees.*

[10] Teletype also appeals the district court's award of attorney's fees to plaintiffs and intervenors, 492 F.Supp. 405. Because the award may be modified in light of our vacating the permanent injunction and because the total amount of the award be fixed until the claims of all the individual class members have been decided, we do not consider the award to be a final order subject to review at this time. We, therefore, dismiss the appeal on this issue without prejudice.

VII. *Cross-Appeal.*

Tommie Taylor,[26] Virginia S. Burke, Earl Jones, and William James Walker appeal the district court's dismissal of their claims. Having fully reviewed the record, we conclude that Teletype successfully rebutted the four individual prima facie cases. Thus, we affirm the dismissal of these claims.

Only Taylor's claim merits extended comment.[27] Teletype advanced three nondiscriminatory reasons to rebut Taylor's prima facie case of discrimination in her demotion from Industrial Relations Associate (ANSE 2) to grade 910: Taylor's poor job performance in drafting the 1975 Affirmative Action Plan; her unauthorized absence on March 24, 1975, despite her superior's order not to take the day off; and the plant-wide layoffs required by worsening economic conditions. The district court found that these reasons existed in fact and were not pretextual. We affirm these findings.

---

[26] Taylor's cross-appeal concerns her first demotion from industrial relations associate to a 910 public relations representative.

[27] We note that the cross-appellants' brief contains no arguments relating to the appeals of Burke, Jones, and Walker.

VIII. *Conclusion.*

To summarize our opinion:

1) We affirm the district court's conclusion of classwide racial discrmination in demotions for the years 1974-76;

2) We vacate the district court's order for permanent injunctive relief and remand for further consideration;

3) We affirm the court's findings of discrimination on the claims of Peyton, Harris, and Taylor in her second demotion;

4) We vacate the court's finding of discrimination as to Bibbs and remand for further proceedings;

5) We affirm the orders for relief on the claims of Taylor and Peyton;

6) We dismiss the appeal on attorney's fees without prejudice as premature; and

7) We affirm the court's finding of no discrimination on Taylor's first demotion claim and on those of Burke, Jones, and Walker.

Affirmed in part, injunction vacated, and cause remanded for further proceedings.

APPENDIX B

Tommie W. Taylor and Larry C. Peyton,
Plaintiffs,

v.

Teletype Corporation,
Defendant,

James H. Bibbs, Ike Bolden, Virginia Burke, Bowman Burns, Jr., Fred Donley, Ray Jackson, Ray Kennard, Will Simmons, William Walker, James Walters, Jr., Cato Conley, Joseph Harris, Earl Jones, and Godfrey Hill,
Intervenors.

No. LR-C-77-65.

United States District Court,
E. D. Arkansas, W. D.

Aug. 29, 1979.

OPINION

ARNOLD, District Judge.

This is a Title VII case. The question is whether certain employees of the defendant Teletype Corporation, which is an employer engaged in interstate commerce, were demoted because they were black. The case was tried to the Court without a jury on July 24, 25, 26, 27, 30, and 31, and August 1, 2, 3, 6, 7, 8, 9, and 10.

I. PRIMA FACIE CASE

Teletype Corporation makes teletype and other related machines for the long-distance transmission of data. Teletype operates two manufacturing plants, one in Little Rock, Arkansas, and one in Skokie, Illinois. The history of the little Rock plant is set out in some detail in *Hoard* v.*Teletype Corp.*, 450 F.Supp. 1059 (E.D.Ark.1978), a case tried by the Hon. Gerald W. Heaney, Circuit Judge, sitting by designation. At the beginning of the trial in the instant case, plaintiffs and intervenors moved for a ruling that the findings and conclusions of the Court in *Hoard* be treated as *res judicata*. Defendant agreed to the motion, but only on condition that it include also those findings that were favorable to it. The motion was granted on this condition, so certain findings of the Court in *Hoard* may be set out here as part of the background of this opinion. In addition, there is ample support in the record of this trial for most of the findings about to be mentioned.

Teletype opened its plant in Little Rock in 1957. At that time the only blacks hired were janitors. The company deliberately followed a policy of racial discrimination. The company followed this policy because of its desire to avoid trouble, or what it thought would be trouble, by taking a public attitude too different from prevailing social customs at the time. It should be noted, in all fairness, that the company's conduct was not illegal in 1957. In 1960 Teletype Little Rock employed its first black in a position other than a janitor. By July 30, 1964, shortly after the passage of the Civil Rights Act which included Title VII, seven per cent of its employees were black. Race was a factor in this underrepresentation. In 1970, six years after the passage of the Act and two years after the issuance of an executive order applying to government contractors, of which Teletype was one, an affirmative action plan was developed for the first time. An equal employment opportunity coordinator was also appointed in that year, but the equal employment opportunity program at Teletype has not been signally successful. As the

Court found in *Hoard,* "the EEO coordinators appointed by Teletype for the Little Rock facility were not properly trained or given adequate direction and support, and were unable to provide an effective affirmative action program." 450 F.Supp. at 1062. Until at least 1971, discrimination against blacks continued to hiring for all positions other than service, clerical, and the operative positions below grade 95. (Hourly-wage positions, most or all of which are held by employees covered by a collective-bargaining agreement, have been customarily referred to by two-digit numbers, beginning at 91, the lowest level, and continuing up to grade 98. Salaried employees, on the other hand, most of whom are not part of the bargaining unit, are referred to by three-digit numbers, beginning with grade 903 and continuing up to grade 910. There are numerous other refinements in the grading system at Teletype, some of which will be referred to later.)

After 1974, when the *Hoard* action was initiated, there was no discrimination in initial hiring, but between 1971 and 1974 the company continued to discriminate in hiring for higher-grade professional and supervisory positions. Blacks were also discriminated against with respect to promotion to supervisory positions and bargaining-unit positions above grade 95. As the court held in *Hoard,* "the discrimination cannot be explained or justified by the seniority provisions of the collective-bargaining agreement or the seniority practices of the company," 450 F.Supp. at 1064, because "under the terms of the collective bargaining agreement, seniority is a factor but is not controlling in movement of employees within the bargaining unit. . . . [m]anagement retains final approval of movement within the production unit." *id.* at 1063. See also *id.* at 1068. The *Hoard* Court nevertheless absolved defendant of discrimination with respect to discharges and with respect to promotions into certain grades. Claims of discriminatory failure to promote were made in *Hoard* with respect to grades 96, 97, 98, TG (Trades Group) 1 and 2, 505 through 510 (the equivalent of 905 through

910), jobsetters and machinesetters, engineering associates (EA), UG (Ungraded—sometimes also referred to as ANSE, standing for Administrative Non-supervisory Employee) 1, 2, and 3, Section Chiefs, and Department Chiefs. Plaintiff's claim of discriminatory failure to promote was upheld only with respect to grades 97 and 98, Section Chief, and Department Chief. With regard to all of the other categories mentioned, the *Hoard* court held that the defendant had satisfied its burden of rebutting a prima facie case.

The instant case involves 16 individual claims, brought by the two original named plaintiffs and 14 intervenors, 13 of whom were permitted to intervene before trial, and one of whom was permitted to intervene after he testified at trial. In addition, on June 5, 1979, a class was certified to be represented by plaintiffs and intervenors, as follows:

> Those black employees of the defendant who were demoted on or after February 28, 1974, including both bargaining-unit and non-bargaining-unit employees, and including those persons still employed by defendant and those employees no longer employed by defendant.

This opinion will address each of these claims in turn, but before doing so it is appropriate to add some details to the general history of black employment at Teletype—Little Rock already mentioned, and to address the question whether plaintiffs have made a *prima facie* case.

Both sides presented statistical evidence which the Court has found interesting and helpful. Dr. John Drane, defendant's statistician, presented a study of demotions between February 28, 1974, the beginning date for the certified class under this Court's order, and June 26, 1979. There were 1132 demotions during this time period, 301 of which involved blacks. There were 2,759 total employees during this time period, of whom 684 were black. The black representation in the work force was 24.79%, while black representation among employees demoted was 26.59%. The question, of course, is whether this deviation is statistically significant. In approaching this issue, statisticians use a concept known as the "standard deviation." This concept involves a comparison of the number of blacks actually demoted with the number that one would expect to be demoted if color were not operating as a factor. Here, since black representation was 24.79%, one would expect black demotions also to be 24.79%, unless color had some operative effect. Black demotions were larger, to be sure, but were they sufficiently larger to raise an inference?

Dr. Drane computed the "standard deviation" to be 1.403, and there is no dispute over the mathematical accuracy of his computation. In this situation, there is reason to believe that the differences are not statistically significant. The Supreme Court has had occasion to describe the "standard deviation" concept in a related context. In *Castaneda* v. *Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the Court was dealing with a sample of 870 persons. "As a general rule for such large samples," the Court said, "if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." *Id.* at 496 n. 17, 97 S.Ct. at 1281. The same observation was repeated with approval in *Hazelwood School Dist.* v. *United States,* 433 U.S. 299, 309 n.14, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). Here, a standard deviation of 1.403 is well below the level mentioned by the Supreme Court, so Dr. Drane's evidence indicates, when considered alone, that actual black demotions did not deviate from expected black demotions sufficiently to ground a reasoned inference of discrimination.

On the other hand, Dr. Frank A. James, plaintiffs' statistician, presented studies that took a different point of view. He was not in significant disagreement with Dr. Drane with respect to the total time period covered by the class certified in this case, but Dr. James presented a more narrowly focused analysis of layoffs during the years 1974 through 1976. This case, of course, is about downgrades or demotions, not layoffs, but in a sense a layoff is the ultimate downgrade, and many of the layoffs that occurred at Teletype were the result of demotions of higher graded employees, employees who in turn "bumped" others, thus ultimately resulting in layoffs. Layoff statistics, therefore, may reasonably be considered a proxy for demotions for purposes of analysis. During the years 1974 through 1976, or, what is the same thing, during the years 1975 and 1976 (there were no layoffs in 1974), a total of 457 employees were laid off at Teletype—Little Rock. The greater number of the layoffs occurred in 1975, because that was a year of economic contraction which resulted in drastic reductions in the work force. Of the 457 persons laid off, 113, or 24.7%, were black, while 344, or 75.3%, were white. During this time period blacks constituted 20.4% of the work force. (This last percentage is taken from EEO Reports filed by Teletype and is somewhat imprecise, in that these reports included supervisory employees as well as others, while the layoff statistics analyzed by Dr. James included only non-supervisory employees. The number of supervisory employees, however, was relatively small, and it has not been shown that their inclusion significantly distorted Dr. James's computations.) The comparison between the number of blacks in the work force and the number of blacks actually laid off for this shorter time period yields a standard deviation of 2.28.

According to Dr. James, and his testimony is not disputed on this point, when the standard deviation is 2.28, the chance that only random factors produced the discrepancy is between one and two percent. To put it another way, a standard deviation of 2.28 enables a statistician to state, with a confidence level between 98 and 99, that some factor other than random selection was in operation. A difference of 2.28 falls right in the middle of the range referred to by the Supreme Court in *Hazelwood* and *Castaneda*, so those two cases do not appear dispositive one way or the other on this point. It should be noted, however, that the regulations of the Equal Employment Opportunity Commission, which are entitled to some deference from this Court, indicate that a 95-per cent level of confidence is statistically significant. This level of confidence is the mathematical equivalent of a standard deviation of 1.645. See 29 C.F.R. § 1607(5)(c)(1). *Cf.* the dissenting opinion of STEVENS, J., in *Hazelwood,* 433 U.S. at 318 n. 5, 97 S.Ct. 2736, indicating that a 95% level of confidence may be significant. This Court does not believe that this statistical evidence, in view of the rule of thumb announced by the Supreme Court in *Hazelwood* and *Castaneda,* would of itself be sufficient to make a *prima facie* case of discrimination. As to the time period 1974 through 1976, however, it certainly is entitled to consideration along with other factors, and may help to support a *prima facie* finding.

Other evidence indicates that Teletype was slow to develop an effective equal opportunity effort, even after the effective date of the Civil Rights Act of 1964. There was, for example, an apprentice training program that began in 1957. No blacks were accepted into the program until 1971. From time to time in its affirmative action programs the company made various commitments, but its performance did not always live up to the commitments. The 1971 AAP, for example, recognized that blacks were under-utilized in the engineering associates category. Yet, as will be seen below when the individual claims are discussed, a balck engineering associate was demoted in 1975 even though he had been ranked above 13 out of 31 engineering associates ranked below him were not demoted at the same time. Blacks were particularly hard hit—"victimized" in the words of Lafayette Y. Morrison, Jr., defendant's black EEO coordinator at the Skokie plant—by demotions and layoffs in 1975, a time when the company was forced by business conditions to reduce its work force substantially. There were, for example, 1,764 employees at Teletype—Little Rock at the end of 1974. By the end of 1975, the number had decreased to 1,259 (PX 113). The percentage of blacks had also decreased.

In other words, blacks were harder hit by the layoffs than whites were. Blacks had come to the work force late and therefore tended to be disfavored when the time came to pare down the payroll.

As noted by the court in *Hoard,* and as is evident from a reading of Article 28 of the Collective-Bargaining Agreement (PX 110), seniority was a factor in personnel decisions, but it was not the controlling factor in every case, at least so far as the contract itself is concerned. (The contract, of course, relates only to bargaining-unit employees.) Other factors, less susceptible of objective measurement, were important, such as competence and experience, these factors to be applied in the discretion and judgment of company management. The same can be said with regard to non-bargining-unit employees. Those to be laid off, according to a policy guide dated March 21, 1975, would be determined in accordance with their ability, performance, potentiality, term of employment, and the needs of the business. The application of these factors necessarily involved the exercise of a substantial degree of subjective judgment. "Term of employment" was only one factor among several to be considered.

Mrs. Marianne Eastin, a Section Chief in the Personnel Department, testified that affirmative-action goals could not be considered during a time of economic contraction. Seniority only had to be the criterion in that event, she said. This testimony is at variance with the terms of the collective-bargaining contract. Section 3 of Article 28 governs movement of personnel when lack of work necessitates decreasing the work force. Under Section 3.1, for example, the company has the right to exempt from layoff certain employees "where such exemptions are necessary to avoid unreasonable departmental depletions," and may also exempt from declaration as surplus those employees "whose skill, training, or experience is necessary for the efficient operation of the business." Company officials testified that such exemptions seldom occurred, and there is no doubt that seniority was one of the most important single considerations looked to in determining whom to demote and where to put employees who had been demoted. The fact remains, however, that seniority was not controlling. The company was at liberty to consider other less easily measurable factors, and this fact must be taken into account when considering possible explanations for the disproportionate adverse impact on blacks of the 1975 reduction in force.

This reasoning applies *a fortiori* to non-bargaining-unit employees. According to Teletype's "Rules for Reduction of Salaried Force" dated June 19, 1975 (PX-51), all salaried employees were to be "rank ordered by department or function and bumped based on rank order . . . ." The rank ordering itself, necessarily, represented the judgment of supervisory employees based on a number of criteria.[1] Among those taken into account for this purpose were performance on the job, conduct, attendance, the value of the job to the department, and the ability of the employee to get along with others. The extent to which a certain employee's duties could be dispersed among other employees was also material. In addition, it is a management decision to determine in the first place how many employees should be declared surplus, a decision that obviously influences the degree of adverse effect felt by lower-ranking employees, more of whom, proportionally, were black. This management decision apparently was made without reference to affirmative-action goals. Most of the decisions with respect to the precise effect of reductions in force, moreover, were made by white supervisory and salaried employees. There were only a few black placement analysts, and during most of the relevant period Mrs. Tommie Taylor, one of the named plaintiffs herein, was the only black employee in the Personnel Department. There is no requirement of law, that blacks must be involved in personnel decisions affecting other blacks, but when black employees, at least on the face of it, appear to bear the brunt of economic downturns, and when whites are the only ones, or almost the only ones, determining the impact on the work force of such downturns, the impartiality of the entire process can fairly be drawn in question.

---

[1] Furthermore, it was not always followed, as we shall see when the individual claim of Larry Peyton is discussed.

[1] To summarize, the company has a proved history of discrimination on the basis of race extending in some respects up to as late as 1974. In times of economic downturn, blacks, latecomers that they were, suffered more severely. No effective affirmative-action program at Little Rock was mounted. The Court does not wish to be understood as minimizing the efforts that Teletype did make. The company began informal affirmative-action efforts in 1961, substantially in advance of the Civil Rights Act. There is no showing that the disparate impact of layoffs and demotions in 1975 was the result of a conscious effort to harm blacks as such. The fact remains, however, that blacks were harmed more than whites, and this harm cannot be ascribed entirely to the operation of a bona fide seniority system that had only the effect of perpetuating pre-Act discrimination. Here, a substantial amount of discrimination was still continuing as long as ten years after the Act was passed. Considering all these factors, the Court finds that the plaintiffs have made a *prima facie* case with respect to black employees demoted between February 28, 1974, and the end of 1976. No such *prima facie* case has been made with respect to demotions in 1977, 1978, and 1979. With regard to these last three years, the Court accepts defendant's statistical evidence.

In making this finding that plaintiffs have partially sustained their burden of making a *prima facie* case of racial discrimination, the Court is mindful of the Supreme Court's recent opinion in *United Steelworkers of America* v. *Weber,* ____ U.S. ____, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). The Supreme Court referred in particular to the remarks of Senator Clark during debate on the bill that included what was to become Title VII: high unemployment among blacks "is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why this bill should pass.' " At ____, 99 S.Ct. at 2727, quoting 110 Cong.Rec. 7220 (1964). Yet, 15 years after the passage of the Act, the problem is still with us. Last year black unemployment was 129% higher than white unemployment. At ____ n. 4, 99 S.Ct. 2721. Title VII may properly be construed with the purpose of Congress to redress that inequity in mind. It may be easier for defendant to rebut this *prima facie* case with respect to bargaining-unit employees, especially those in lower grades, because the importance of seniority as an objective factor was greater at that level, but the Court is nevertheless persuaded that a *prima facie* case has been made, both with respect to bargaining-unit and nonbargaining-unit employees, for the years 1974, 1975, and 1976.

II. THE INDIVIDUAL CLAIMS

[2,3] Sixteen individual claims are before the Court. No proof was presented at trial with respect to the intervenors Ike Bolden, Will Simmons, James Walters, Jr., and Ray Jackson. Defendant's motion to dismiss with respect to these four, which their counsel did not oppose, was granted in open court. In addition, defendant points out that intervenors Fred Donley and Ray Kennard were not demoted after February 28, 1974, and are therefore not members of the class which the Court has certified. These parties might have had a claim for pre-1974 discriminatory demotion, but it would have to be an individual claim, and the Court lacks jurisdiction to decide it, because neither Mr. Conley nor Mr. Kennard ever filed a charge before the EEOC. 42 U.S.C. § 2000e—5(f)(1). The Donley and Kennard claims are therefore also dismissed with prejudice.[3]

---

[3] On August 20, 1979, in their response to defendant's motion to dismiss these claims, intervenors asked that this Court's order [illegible]fying a class be amended to extend back until December 3, 19[illegible] (the

A. Tommie W. Taylor

[4] The plaintiff Tommie W. Taylor was first employed by the defendant Teletype Corporation on January 2, 1962. She was employed as a clerical in grade 903, a salaried position not covered by any collective-bargaining agreement. Mrs. Taylor was the first black clerical employee hired by Teletype at its plant in Little Rock. Her employment was primarily due to the efforts of Frederick DeWolfe Walker, Chief Executive Officer of the Little Rock plant at the time. Mr. Walker had been commendably active at an early date in promoting opportunities for black applicants and employees and had identified himself with groups such as the Urban League that were actively engaged in promoting equal opportunity at a time when such efforts were far less acceptable in the Little Rock area than they are today.

---

beginning date of the promotion class in *Hoard*), instead of February 28, 1974. This request is denied. The class was certified by Order dated June 5, 1979. The trial was completed on August 10, 1979. It would not be fair to the defendant to expand the class at this late date to include the many black persons presumably demoted between December 3, 1971, and February 28, 1974. It is not simply a matter of considering two additional individual claims. Post-judgment determination of a class, or post-judgment modification of a class previously determined, must be the exception rather than the rule. *Cf. Marshall* v. *Kirkland*, 602 F.2d 1282 at 1301 (8th Cir. 1979).

Nor would these claims fare any better under 42 U.S.C. § 1981, which intervenors also pleaded by reference to the original complaint. Assuming that a 1981 claim would not be time-barred by the Arkansas three-year statute of limitations, Messrs. Donley and Kennard have not sustained the burden of showing purposeful discrimination, which is an element of a 1981 claim, as distinguished from Title VII. See *Marshall* v. *Kirkland, supra,* at 1298-1299. Mr. Kennard's demotion was part of a good-faith reduction in force and did not violate the collective-bargaining agreement. Mr. Donley's demotion may have been in violation of the agreement; he claims that the man who "bumped" him had had no previous experience as a plater. He had, however, had experience as a heat treater, a job in the same department, and he had been a supervisor of platers. The company treated that experience as sufficient, and this Court is unable to say that this judgment was infected by conscious racial motives.

Mrs. Taylor rose through the ranks of clerical employees and eventually, on March 1, 1969, became a grade 906 in the reproduction section, a group of employees whose responsibility it is to copy plans and other documents for use in the plant. The reproduction section was attached to the Personnel Department. On August 1, 1970, Mrs. Taylor was again promoted, this time to a grade 908, and in time she became the lead person in reproduction.

One of the machines in the reproduction area was called a "Bruning" machine, and this machine used ammonia in some way to reproduce large drawings. Mrs Taylor had difficulty with the ammonia, the Teletype's Medical Department recognized the difficulty by issuing to her on January 26, 1967, a form entitled "Notice of Employee's Work Restrictions and Temporary Work Classification" (PX-13). This form, signed by Louise Ferguson, Registered Nurse, specified that Mrs. Taylor was not be be exposed to ammonia gas fumes. This work restriction, which was temporary when issued, became permanent on March 12, 1969 (PX-15), at which time a new form specified that Mrs. Taylor was not to be exposed to "systemic poisons." The form was simply an internal communication within the company to inform all employees who needed to know that Mrs. Taylor was not to be exposed to ammonia.

On July 1, 1971, again primarily because of the continued interest of Mr. Walker, Mrs. Taylor was promoted to Civic Relations Assistant, a job in the category referred to as either "U.G. 1" (U.G. stands for ungraded) or ANSE 1 (ANSE stands for Administrative Non-Supervisory Employee). As Civic Relations Assistant, Mrs. Taylor was given responsibilities substantially different from the clerical duties she had previously performed. She was moved out of the reproduction area and into the Personnel Department proper. Mr. Walker's decision to promote her to this job probably stemmed from concerns that had been expressed to the company by black community leaders in Little Rock. In 1971, primarily because of worsening economic conditions, massive downgrades and layoffs had occurred at the Little Rock plant, and black employees, who on the whole came to Teletype later than many whites, were hard hit. It was thought that the assignment of Mrs. Taylor, who is black, to a civic relations position would begin to improve communication with the black community. Mrs. Taylor's duties as Civic Relations Assistant fell primarily into two categories: representing the company at meetings of black organizations, and assisting in the preparation of affirmative action plans, which the company was required to produce and sign yearly as part of its obligation as a government contractor. Mrs. Taylor did not initially do much of the writing of these plans, but she did have increasing exposure to the process of plan preparation.

On June 18, 1973, Mrs. Taylor was again promoted, this time to Industrial Relations Associate, an ANSE 2, or U.G. 2, position. Her duties at first were substantially the same as before, except that she was expected to operate with less supervision. In early 1975 Joe Garrison, Department Chief of the Personnel Department, assigned Mrs. Taylor the job of preparing the 1975 Affirmative Action Plan (commonly referred to as the AAP) from start to finish. Mrs. Taylor was to prepare a complete draft of the plan and give it to Mr. Garrison for his review in final form. (There is a sharp conflict of testimony about this, but the Court believes Mr. Garrison.) Problems began to crop up at once. When Mrs. Taylor submitted to Mr. Garrison a portion of the 1975 AAP (PX-58), he noticed some deficiencies. Many of these deficiencies were minor, but some of them were not. Some of the statistical information that the Plan was supposed to include, for example, was not correct, and Mrs. Taylor apparently did not clearly understand how to compute ratios of certain groups of employees. On February 19, 1975, Mr. Garrison reviewed these problems with her and expressed doubts as to whether she could handle the job of writing an AAP. In a memorandum of this conversation dated February 20, 1975, Mr. Garrison observed that "it is possible that Mrs. Taylor would be better suited for civic relations or the reproduction area." Mrs. Taylor, Mr. Garrison, and others working together then completed the AAP for 1975. (In this connection, the Court thinks it significant that Mrs. Taylor's calendar for the year 1975, which is in evidence as DX-4, contains the notation "complete AAP" under date of February 5. This exhibit, which is apparently in Mrs. Taylor's own handwriting, strongly indicates that she had primary responsibility in 1975 for AAP preparation).

On March 20, 1975, Mrs. Taylor asked Mr. Garrison, who was her immediate supervisor, to be allowed to take Monday, March 24, as a day of vacation. Mr. Garrison declined the request. It was his opinion that Mrs. Taylor should plan to work on that Monday because March 31 was the due date for the AAP. Mrs. Taylor agreed to report to work on Monday the 24th. On that morning, however, she called in with a "tension headache." She spoke with Mrs. Marianne Eastin, a Section Chief in the Personnel Department. Mr. Garrison was not in when Mrs. Taylor called. Mrs. Taylor told Mrs. Eastin that she and Mr. Garrison had discussed Mrs. Taylor's taking a day's vacation on Monday, March 24, but she did not tell Mrs. Eastin that Mr. Garrison had declined to approve this request. Mrs. Eastin, who was not operating with full knowledge of the facts, suggested that Mrs. Taylor simply take a day's vacation on that Monday, and she did so. When Mrs. Taylor returned to work the following day, Mr. Garrison reprimanded her for the absence and stated that in his opinion she had not assumed her full responsibility in the completion of the 1975 AAP. "In my judgment," Mr. Garrison wrote, "the 1975 AAP would not have been completed on schedule if it had been left entirely to Mrs. Taylor" (PS-46).

Finally, on April 24, 1975, Mr. Garrison informed Mrs. Taylor that she was being downgraded from ANSE 2 to Grade 910, with the new title of Public Relations Representative. The decision to downgrade Mrs. Taylor was made by Mr. Garrison, Mrs. Eastin, and M. E. Seamon, an Assistant Manager. There were three reasons for the demotion: Poor job performance in connection with the drafting of the 1975 AAP; the incident of Monday, March 24, the day of Mrs. Taylor's unauthorized absence; and a general expectation that economic conditions were worsening and that layoffs and demotions would be required plant-wide. The Court finds that these were indeed the reasons for the demotion, and that the company has rebutted plaintiff's *prima facie* case with respect to this downgrade. The reasons were not merely pretextual, and the downgrade was not based on Mrs. Taylor's race, in whole or in part. It should be noted, in addition, that the financial consequences of the downgrade to Mrs. Taylor were not great. Her salary as an ANSE 2 immediately before the downgrade was $1,050.00 a month. After the downgrade, she began receiving $1,005.00 a month in her new position at Grade 910, but this $45.00 per month reduction lasted only until July 1, 1975, at which time she received a salary increase to $1,076.00 per month.

Mrs. Taylor then began work in her new, downgraded, position as a 910. In this position her duties were primarily in the reproduction area. She was supposed to continue civic-relations functions, for example attending meetings of groups interested in equal opportunity, but in fact very little of this kind of work was done after April 24, at least in part because her superiors in the company refused to give her permission to leave the plant for this purpose. Some time in August, while Mrs. Taylor was absent because of surgery, it was decided to downgrade her again, this time to a 906. The downgrade was scheduled for September 1, 1975, but was delayed until Mrs. Taylor returned from work after her sickness (PX-53).

When she did return, on September 22, 1975, she whent first to the Medical Department, which was customary practice for employees returning after an illness. Ms. Ferguson gave Mrs. Taylor another form indicating a permanent restriction to exposure to systmic poisons, including ammonia (PX-54). Since

Mrs. Taylor had been working in the reproduction area since her first downgrade, there had been some discussion about requiring her to work on the Bruning machine, and the work restriction issued on September 22 simply reaffirmed that Mrs. Taylor was not to be required to do this work. She then made her way back to the Personnel Department, where Mrs. Eastin informed her of the second downgrade. Mrs. Eastin told her that she was to do the "full tour duty," including running the Bruning machine. It was not fair to the other employees, Mrs. Eastin said, for Mrs. Taylor not to perform the full range of duties. Mrs. Eastin told her that if she could not perform these duties, another job would have to be looked for, and if none was available, she would be laid off. Mrs. Taylor went back to the reproduction area and worked on the Bruning machine, but exposure to the ammonia made her ill. The same thing occurred each day of that week, and finally, on September 26, 1975, Mrs. Taylor elected to be laid off instead of remaining as a Grade 906 clerk. The company form, PX-57, indicating the layoff contains the following notation: "rehire consideration: consult Personnel Department prior to consideration for re-employment."

There was a reduction in force taking place at about this time, and economic contractions of this kind can of course furnish a legitimate and nondiscriminatory reason for demotions or layoffs. In this instance, however, the Court does not believe that the defendant has articulated such a reason with sufficient clarity. There are too many inconsistencies in the explanations offered to be convincing. Mrs. Taylor has worked in reproduction for a number of years before her promotion in 1971. During the last four of those years, she had been subject to the work restriction with respect to the Bruning machine. There was no complaint whatever about her performance at that time. She was uniformly reported to be an excellent employee. Apparently the company found no difficulty in accommodating itself to her inability to use the Bruning machine. When Mr. Garrison demoted her from ANSE, 2 to 910 in April, he did not intend that she be required to work around the Bruning machine. (Mr. Garrison left the Personnel Department on September 1, 1975 and was apparently not involved in the decision to demote Mrs. Taylor from 910 to 906). It is suggested that the number of employees in the reproduction area was significantly less in 1975 than it had been previously, and that therefore the company could not afford to have an employee who was unable to perform the full range of duties. This suggestion cannot withstand analysis. Just before Mrs. Taylor was promoted out of the reproduction area in 1971 she and two other employees were the only ones in reproduction on a permanent basis. At that time she was the lead person in reproduction, and the machines were operated efficiently without her having to come in direct contact with the Bruning machine. In addition, when Mrs. Eastin and Mrs. Taylor conferred with Mr. Seamon the last week of Mrs. Taylor's employment about this problem, Mr. Seamon several times expressed the opinion that there would be enough work in the reproduction area to occupy Mrs. Taylor without compelling her to use the Bruning machine personally, a suggestion rejected by Mrs. Eastin. In short, Mrs. Taylor was forced out of the company. She had no real choice except to accept a layoff. Her conceded health problems prevented her from accepting the second demotion to a Grade 906, because this position would have required her to work with the Bruning machine. A company is not required by the Civil Rights Act or any other enactment, of course, to continue employing a person who is physically unable to do the job. But the company had employed Mrs. Taylor in this job for a long period of years with full knowledge of her health problem, which was a genuine one and is not in dispute. The Court therefore finds that the company has not successfully rebutted the prima facie case of racial discrimination with respect to Mrs. Taylor's second demotion and subsequent layoff.

B. Larry C. Peyton

[5] Larry C. Peyton first came to work at Teletype on December 16, 1968. He was made an engineering associate, an ungraded job not in the bargaining unit, on May 14, 1973. He was part of the commercial-inspection section of the Engineering Department. His duties were primarily electronic, rather than mechanical, in nature, and he was uniformly regarded as a good employee. There were no complaints about either the quality or the quantity of Mr. Peyton's work.

During the first part of May, 1975, Glenn Paul Steubenrauch, Assistant Manager for Manufacturing and Engineering, passed on a direction that all engineering associates be rank ordered. The company knew that an economic contraction was in the offing, and one of the purposes of making the rank order was to enable management to make rational decisions when the time came about who should be laid off or demoted. Mr. Steubenrauch's direction went to, among others, James Moore Eldredge, one of six department chiefs under Mr. Steubenrauch's jurisdiction. Mr. Eldredge prepared a rank order of five engineering associates under this supervision. Intervenor was ranked fourth out of the five. The factors used by Mr. Eldredge included technical ability, flexibility in adapting to assignments, and cost-reduction efforts. Mr. Eldredge then met with five other supervisors and came up with a combined rank order covering all 31 E.A.'s. Mr. Peyton was ranked eighteenth out of the 31.

Shortly thereafter Mr. Steubenrauch asked Mr. Eldredge and the other supervisors in engineering to select one employee who could be dispensed with if the necessity for demotions or layoffs came about. This request was made in June or July, and Mr. Eldredge reported that Mr. Peyton would be the person to lay off or demote if someone had to be selected. Four persons, three of them white, were then downgraded on July 28, 1975. Mr. Peyton was demoted to T.G. (Trades Group) 1, a job that initially paid no less than he had earned an as E.A., but that involves significantly less fringe benefits, prestige, and opportunity for future advancement. Some of the other persons ranked below Mr. Peyton, all 13 of whom were white, were not demoted at this time. Mr. Peyton's demotion left only one black among the company's remaining 27 E.A.'s

These circumstances, particularly the demotion of a black employee who was ranked so high so recently, raise a strong inference of racial discrimination. Reasons given by the company for selecting Mr. Peyton for demotion are not sufficient to rebut this inference. It is true that R. V. Tucker, who was ranked twentieth, was doing especially important work at the time. He was drafting instructions for other employees to use in inspecting outside cabinetry designed for the company's new Model 40 machine. Mr. Peyton had no intensive experience in such work. He did however, have some familiarity with the Model 40 machine, including its outside cabinetry, and he could have learned to do the same job that Mr. Tucker had been doing, and to do it well, in about one month. (Tucker, incidentally, had been ranked fifth out of five in Mr. Eldredge's rank ordering of E.A.'s under his direct supervision.) In addition, a thirty-second E.A., R. H. Zieman, who was white, was not even considered for demotion. As Mr. Steubenrauch testified, Mr. Zieman had been with the company thirty-five years and had recently been downgraded from Section Chief, but the fact remains that the company's preferment of Mr. Zieman over Mr. Peyton was a direct violation of Section 2.12(a) of a T.I. (Teletype Instruction) dated March 21, 1975 (PX-45) setting out procedures to be followed in selecting E.A.,'s for demotion or layoff. Under this written policy, E.A.'s rated outstanding or good should replace those merely satisfactory "or not appraised." Mr. Zieman was not assessed when the rank order of the other 31 E.A.'s was compiled. See DX-1. The Court concludes that Mr. Peyton's demotion on July 28, 1975, was based at least in part on his race.

C. James H. Bibbs

[6] James H. Bibbs was first employed by the company on October 14, 1968. On March 31, 1975, he was downgraded from a 94 Stockkeeper to a 93 Stock Selector. Two white employees with less seniority were left at Grade 94. This difference in treatment has not been explained. Mr. Bibbs's work record had been satisfactory. The Court therefore finds that his demotion was based at least in part on race.

D. Virginia S. Burke

[7] Virginia Smith Burke was first employed by the company on October 31, 1966. On September 1, 1975, she was downgraded from a 908 Accuracy Checker in the Engineering Department to a Grade 94 Inspector in the bargaining unit. She was the only black employee in her part of the Engineering Department out of a total of 15. Her place was taken by Felix Cieselski, who had been demoted from Engineering Associate. Mr. Cieselski was white. Ms. Burke was the first black Accuracy Checker, and no black has been an Accuracy Checker since her demotion.

Ms. Burke's supervisor was Joe Sullivan. He had 31 employees under his supervision, including some in the Accounting Section and some in the Industrial Engineering Section. Ms. Burke was in the latter section. Out of Mr. Sullivan's 31 employees, two were black, and both of them were downgraded on or about September 1, 1975. Four out of the 15 employees in Industrial Engineering were downgraded or laid off. These four were the lowest on a rank order that had been prepared under Mr. Sullivan's supervision. The purpose of the rank order was to assist the company in making decisions made necessary by a slackening of demand. The criteria used were performance, skill, and value to the department, considering both the individual and the job held. Ms. Burke was ranked thirteenth out of 15 on the rank order, which was prepared on June 24, 1975 (DX-32). The other persons among the four lowest employees were Ollie Quire, a 905 Clerk, who was white, ranked fifteenth, L. M. Kersey, a white Engineering Associate, ranked fourteenth, and Joe Favor, a white Engineer, ranked twelfth. Quire was downgraded to a 904 in Reproduction. Kersey and Favor were laid off.

The Court finds that the company has rebutted the *prima facie* case with respect to Ms. Burke's demotion. The rank order was prepared in good faith and without regard to racial considerations. The four employees demoted or laid off in Industrial Engineering were the last four persons on the rank order, and three of these four were white. The issue is not without its difficulties, but on balance the Court holds that Ms. Burke's demotion was not unlawful.

E. Bowman M. Burns, Jr.

[8] Bowman Matthew Burns, Jr., was first employed by the company on February 21, 1966. On April 10, 1978, he was downgraded from a 97 in Screw Machine to a 96 in Drill Press.

The date of Mr. Burns's downgrade takes him out of the time period with respect to which the Court has found a *prima facie* case of discrimination. Even if he had the benefit of this finding, however, the downgrade would not be unlawful, because Mr. Burns's own testimony shows that it was not based on race. Both whites and blacks were affected at the time, and some of the whites demoted had more seniority than Mr. Burns. In addition, Mr. Burns testified that he was not complaining about the 1978 downgrade. (He had also been downgraded on April 12, 1971, from a 96 to a 94, but the record is devoid of any evidence concerning the circumstances of this demotion.) Finally, the effects of the 1978 demotion were dissipated, for legal purposes, on August 30, 1978, when Mr. Burns was offered promotion to a Grade 97 but declined because he did not wish to return to that grade at that time. DX-34. The Court therefore holds that no illegal conduct occurred with respect to Mr. Burns.

F. Cato Conley, Jr.

Cato Conley, Jr., began with the company on June 24, 1963 as a Grade 93 Janitor. He was promoted several times, until, on March 31, 1975, he was downgraded from a Grade 97 Screw Machine Operator to a Grade 96 Utility Person in the Screw-Machine Section. The company has satisfactorily explained this demotion. Three of four Grade 97 Screw Machine Operators were demoted at the same time, all of whom, except Mr. Conley, were white, and all of whom became Grade 96 and stayed in the Screw-Machine Section. These demotions occurred because of a business slowdown and were carried out based on seniority. Later, Mr. Conley was offered promotion back to Grade 97, but he declined. The Court finds that Mr. Conley's demotion in 1975 was not unlawful.

G. Joseph Harris

[9] Joseph Timothy Harris first came with the company as a Grade 91 on December 5, 1966. He was promoted several times, and on July 1, 1973, became a salaried Grade 908 Stock Analyst, also known as a Results Investigator. On February 19, 1975, he was downgraded to a Grade 95 Layout Operator. On March 31, 1975, he was again downgraded to a Grade 94 in the Wire Department. Mr. Harris was also downgraded on November 7, 1977, but no issue as to the legality of this demotion is presented. The question is whether the 1975 demotions were based, in whole or in part, on the fact that Mr. Harris is black.

The defendant has satisfactorily explained the February 19, 1975, downgrade from 908 to 95. Henry Taylor Smith, who was Mr. Harris's supervisor at the time, made a rank order of his employees. Mr. Harris was second from the bottom. The low three employees, two of whom were black and one of whom was white, were all demoted to Grade 95. Mr. Harris's performance in the 908 job had been spotty at best. Contemporaneous memoranda dated January 31, 1974, and February 20, 1974 (DX-37 and DX-38), show substantial problems with Mr. Harris's performance. When he was again evaluated on December 23, 1974, he was found to be performing satisfactorily (DX-39), but Mr. Smith was entitled to consider the earlier problems in evaluating Mr. Harris for rank-order purposes, and he did so. The demotion of February 19, 1975, was not unlawful.

No similar showing has been made, however, with respect to the March 31, 1975, demotion from Grade 95 to Grade 94. There is no substantial evidence in the record explaining this downgrade. The Court therefore finds that it was unlawful.

H. Earl Jones

Earl Jones was first employed by Teletype on December 13, 1965 as a Grade 91. He was promoted several times, reaching the position of a Grade 96 Automatic Screw-Machine Operator. On March 31, 1975, he was downgraded to a 95 in Drill Press. One other person in Drill Press, Bill Reddick, who was white, remained at a Grade 96, even though he had less seniority than Mr. Jones. Intervenor claims that he should have been "lateraled" to Drill Press as a 96, displacing Mr. Reddick. The company's clear practices, however, as described in detail by Mrs. Eastin, explain why this action was not taken. Mr. Jones had been in Drill Press, but only as a Grade 94 Drill-Press Operator. Mr. Reddick, on the other hand, was a Grade 96 Machine Setter, and Mr. Jones had not previously been a Machine Setter. The company has satisfactorily rebutted Mr. Jones's case, and the Court finds that his demotion was not unlawful.

I. William James Walker

[10] William James Walker was first employed by the company on October 31, 1966, as a Grade 91. He has been demoted four times, on March 8, 1971, on April 3, 1972, on March 31, 1975, and on November 11, 1977. Mr. Walker stated explicitly

that he had no complaints about the 1971 or 1975 downgrades. The circumstances of the 1972 downgrade were not explained, and Mr. Walker's claim with respect to it, if in fact he is making such a claim, must be rejected, since this demotion is not within the time period covered by the Court's finding of a *prima facie* case, and Mr. Walker's proof, considered individually, does not in itself make such a case.

There is a good deal of evidence pertaining to the November 7, 1977, downgrade. On this occasion Mr. Walker was demoted from a Grade 96 Machine Setter to a Grade 95 Punch-Press Operator. Intervenor claims that H. M. Koon, a white man, who was also a Grade 96 Machine Setter, should have been demoted instead of him, and there is some support in the record for this view. Mr. Walker had been a Machine Setter slightly longer than Mr. Koon, and they both had the same effective starting date of service with the company. The company's subsequent conduct with respect to Mr. Walker, however, demonstrates to the Court's satisfaction that his demotion was not based on race. On November 16, 1977, nine days after the demotion, he was temporarily upgraded again to his previous Grade 96, and when this temporary upgrade expired on January 2, 1978, Mr. Walker returned to the 95 level for only one week. He was permanently upgraded to Grade 96 on January 9, 1978. The 1977 demotion, of course, falls outside the *prima facie* case that the Court has found established by the evidence. Even if it were within the relevant time period, the defendant's would be a sufficient rebuttal. It is most unlikely that the company would have upgraded Mr. Walker again so promptly if it had been motivated by the fact that he was black. He was at the 95 level because of the demotion for only 16 calendar days. The Court therefore finds that this demotion was not unlawful. It was part of a lawful reduction in force occasioned by lack of work and carried out without regard to race.

J. Godfrey Hill

[11] Godfrey Hill began with the company on September 29, 1976, as a Grade 91 Assembly Worker. He rose to a grade 93 in Drill Press. He testified that in September 1978 he was demoted to a Grade 92. In 1979 Mr. Hill was terminated for excessive absences.

Mr. Hill's claim falls outside the time period covered by the *prima facie* case that plaintiffs have established. Nor could he make a *prima facie* case on an individual basis, because, as his work record, shortly to be discussed, shows, he was not qualified to work for Teletype. The Court finds that his demotion was not based, in whole or in part, on his race. Mr. Hill testified that some white employees with less seniority were not demoted, but no names of employees were mentioned, and the Court does not credit this testimony. Mr. Hill has an extensive record of documentations for performance and attendance problems during his tenure at Teletype. A total of 21 contemporaneous memoranda of such problems are before the Court as DX-50. On October 12, 1978, for example, while Mr. Hill was still a Grade 93 (apparently his testimony as to the date of his demotion was incorrect), Mr. Hill was told that his efficiency was unsatisfactory and that it would have to be improved or disciplinary action would be taken. On October 23, 1978, when Mr. Hill was a Grade 91 (apparently having been demoted two grades since October 12), he was again "written up" for poor attendance.

III. FURTHER PROCEEDINGS

In summary, the Court finds that there is a *prima facie* case of discrimination against the class on grounds of race in violation of Title VII during the years 1974, 1975, and 1976, and that defendant discriminated with regard to the second demotion and subsequent layoff of Mrs. Taylor, and with regard to the demotions of Messrs. Peyton, Bibbs, and Harris (March 31, 1975 demotion). The other claims will be dismissed with prejudice.

These findings of fact and conclusions of law dispose of the liability issues with regard to the plaintiffs and intervenors. The questions of relief and of liability to class members demoted during the years 1974, 1975, and 1976 remain. The Court would like submissions from the parties covering the following questions, together with any other issue the parties believe should be addressed:

(1) With regard to the class:

(a) What type of notice under Fed.R.Civ.P. 23(d)(2) of the right to file a claim should be given to class members? How should it be worded, what time limits for the making of claims should be imposed, and which party should pay for the notice?

(b) Should the Court grant injunctive relief in view of its finding that the defendant did not discriminate with regard to demotions after 1976? If such relief is appropriate, what should be its scope? Should the defendant be required to institute more objective criteria for the exercise of its discretion in the demotion of employees?

(2) With regard to the individual plaintiffs and intervenors whose claims were found to be meritorious, what relief is appropriate for each of them?

(a)What amount of back pay will fairly compensate Mrs. Taylor and Messrs. Peyton, Bibbs, and Harris?

(b) Should Mrs. Taylor be reinstated and, if so, to what position? Does she come into this court of equity with clean hands, in view of the Court's finding adverse to her on a key question of credibility?

(c) Should those demoted from bargaining-unit positions be immediately reinstated to the positions from which they were demoted, or should they be declared eligible to bid, under the company's seniority system, on the next job opening in that category? Should Mr. Peyton be immediately reinstated to the position from which he was demoted, or should he be granted the next opening in that category? What effect will the resolution of these questions have on back pay?

(3) What further equitable relief, if any, would be appropriate at this stage of the proceeding?

Plaintiffs and intervenors should file their memoranda on or before September 14, 1979, and the defendant should reply by October 1, 1979.

IT IS SO ORDERED this 29th day of August, 1979.

APPENDIX C

Tommie W. Taylor *et al.*,
Plaintiffs,

v.

Teletype Corporation,
Defendant.

No. LR-C-77-65.

United States District Court,
E. D. Arkansas, W. D.

Nov. 2, 1979.

ORDER

ARNOLD, District Judge.

The parties have submitted briefs on the questions raised by the Court's Opinion of August 29, 1979, and those issues will be considered in turn.

I. INJUNCTIVE RELIEF

(1) Is injunctive relief appropriate in view of the finding that the defendant has not discriminated on grounds of race with regard to demotions since December 31, 1976? The plaintiffs persuasively argue that such relief is necessary because of the history of discrimination at Teletype and the findings of discrimination in this case. 42 U.S.C. § 2000e—5(g) authorizes injunctive relief upon a finding that the employer "*has intentionally engaged in* or is intentionally engaging in . . ." an unlawful employment practice (emphasis added); this language contemplates an injunction in this case in the exercise of the Court's discretion. The Court is of the opinion that the issuance of a permanent injunction is necessary fully to effectuate the purposes of Title VII, and it is therefore ordered that Teletype

Corporation be, and it is hereby, permanently enjoined from discriminating against any individual with respect to his or her compensation, terms, conditions, privileges of employment, or in any other manner, because of such individual's race. The final judgment in this case will contain such an injunction.

On the other hand, the Court is not convinced that the defendant should be ordered to institute more objective criteria for the exercise of its discretion in making demotions. There is no indication that such criteria are not necessary. The proof at trial failed to substantiate the lack of objectivity has had an adverse impact upon blacks since December 31, 1976. The Court is mindful, moreover, that the union contract gives the defendant a certain amount of discretion, and the Court is unwilling on this record to intrude upon the collective bargaining process. Such intrusions are often warranted to correct discrimination, but not in this case. The injunction which the Court has issued should be sufficient to assure that the defendant exercises its discretion in a manner which does not discriminate.

II. INDIVIDUAL RELIEF

[2,3] *Tommie Taylor*. Should Mrs. Taylor be reinstated and, if so, to what position? Does she come into court with clean hands, in view of the Court's finding adverse to her on a key question of credibility? The Court found that Mrs. Taylor's second demotion and subsequent layoff were illegal. Because of these findings, she is presumptively entitled to reinstatement and back pay. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), the Supreme Court directed that back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination and making persons whole. The same considerations should govern the reinstatement determination. Although the Court is troubled by the adverse credibility determination, the fact remains that Mrs. Taylor was demoted and laid off because she is black, and denying reinstatement or back pay will not make her whole. In addition, the question of credibility relates to plaintiff's first demotion, with respect to which she did not prevail. The Court finds that she should be reinstated by Teletype. When a wrong has been established, doubts as to the remedy should be resolved against the wrongdoer.

[4] It is argued on Mrs. Taylor's behalf that she should be reinstated to the position of A[illegible]SE I civic relations assistant. The Court held that she was discriminatorily downgraded from the 910 position and then laid off. The defendant argues that she should not be reinstated to any position higher than 910. The Court agrees. The defendant further argues that reinstatement will cause discord and antagonism between Mrs. Taylor and her supervisors and among the employees with whom she would work. Clearly, any discord arising purely from the fact that Mrs. Taylor successfully challenged the demotion and layoff is irrelevant to a reinstatement determination; nevertheless, the record supports the belief that animosity does exist and may work an unnecessary and harmful strain on the work environment if Mrs. Taylor is reinstated to a grade 910 public relations representative position. It is therefore ordered that Mrs. Taylor be reinstated on the following terms: Reinstatement should be to the position of 910 public relations representative or a comparable position. Whether another position is comparable should be judged according to pay, responsibility, the opportunity for creativity and independent judgment, advancement, and similar factors. If Mrs. Taylor is offered a position which she does not believe is comparable, she may ask the Court for further relief.

[5] Other employees need not be displaced. Mrs. Taylor should be offered reinstatement in the first available opening in a 910 or a comparable position of the defendant's choice. Backpay liability will run, however, until she is actually reinstated or refuses the offer. Mrs. Taylor should submit to the Court a claim for back pay in affidavit form, computed to the date of this opinion; the defendant may submit counteraffidavits. Mrs. Taylor is entitled to the amount she would have earned in the 910 position from the date of demotion. Computing back pay as if she would have been promoted to a higher-paying job is too speculative. Interim earnings, including unemployment compensation, and any pay she should have earned through reasonable diligence, must be deducted from the back pay award. *Equal Employment Opportunity Commission* v. *Enterprise Ass'n Steamfitters Local No. 638,* 542 F.2d 579, 591-92 (2d Cir. 1976). She should be made whole with regard to other benefits, pension, insurance, seniority, and so forth.

[6] *Larry C. Peyton.* The Court found that Mr. Peyton was discriminatorily demoted from the position of engineering associate on July 28, 1975. He should be reinstated to that position. The defendant argues that reinstatement should be denied and back pay tolled because in February, 1977, Mr. Peyton was offered the position but refused. Proof at trial was that he refused because he felt it would be too insecure, a belief created in part by his discriminatory demotion. The Court is unwilling to say that Mr. Peyton's feeling of insecurity was unreasonable. He would be an engineering associate today were it not for the violation of law, and it is not clear that the effect of that violation had sufficiently dissipated by February, 1977, to require Mr. Peyton to accept the position at that time. It is argued on Mr. Peyton's behalf that back pay should be adjusted upward because the demotion kept him from being considered for promotion to higher-paying positions, but this position is too speculative. Mr. Peyton should be offered reinstatement in the first available opening in an engineering associate position, and back-pay liability will run until he is actually reinstated or refuses the offer. The defendant's suggestion that the computation should be made by comparing Mr. Peyton's interim earnings with those of the most comparable engineering associate in terms of longevity and rating is a good one. The defendant should make the initial submission of this calculation to the date of this order, and Mr. Peyton will have the opportunity to rebut and submit his own calculation.

James H. Bibbs and Joseph Harris. Both of these employees should be reinstated to the positions from which they were discriminatorily demoted—Bibbs to 94 stock keeper, and Harris to grade 95—and back-pay liability will run until they bid on vacancies and are awarded jobs under the criteria of the union contract. (Mr. Bibbs may have already been upgraded to 94.) Again, it is not necessary that other employees be displaced. The defendant should submit the initial back-pay calculations to the date of this order, and Messrs. Bibbs and Harris may submit their own calculations thereafter.

III. OTHER RELIEF

[7] The plaintiffs argue that back pay computed on a class-wide basis is appropriate, but he Court cannot agree. Computation of back pay on an individual basis will not be unusually difficult. Each demotion turns on its facts, and the defendant is entitled to litigate each individual claim on its own merits. Back pay will be awarded or denied on an individual basis to class members who make claims.

[8] The plaintiffs further request an award of interim attorneys' fees, having prevailed on certain issues in this litigation. It is clear that the attorneys for plaintiffs and intervenors are entitled to an award of attorneys' fees, and there is some precedent for interim awards. The Court is not convinced that an interim award should be granted in this case, however, and it will be denied. The attorneys should submit fee claims prior to judgment, and the fee award will be included in the judgment which is entered finally disposing of this litigation.

IV. FURTHER PROCEEDINGS

The parties have submitted forms of notice to class members for the Court's consideration, which have been helpful. The notice which is attached to this Order has been drafted by the Court. It will be sent, certified mail, to all black persons demoted from February 28, 1974, to December 31, 1976. The defendant argues that it would be sufficient to hand deliver notice to those still employed at Teletype, but the Court does not agree.

The parties disagree on the number of blacks who were demoted. The defendant should submit a list of names and last known addresses to the Court and the plaintiffs, and the plaintiffs will be given the opportunity to submit other names and addresses, and address corrections. As a practical matter, the Court intends that notice be sent to all persons whose names are submitted in good faith by either party so that no one who arguably has a right to make a claim will be left out. If the parties can reach agreement on all who should receive individual notice, then publication will not be necessary. The notices will be sent by the defendant, and the defendant will bear the cost.

The notices will be mailed by December 3, 1979, so that there will be a time period of roughly 60 days for the filing of claims. A few days before that date, the Court will specify the persons to whom notices should be sent. The Clerk will be directed to serve counsel with copies of all claims filed. As the notice indicates, the Court intends for the attorneys for plaintiffs and intervenors to assist any claimant who asks them for help in filing a claim. The Court will enter further orders as necessary and is open to suggestions from the parties at any time concerning the manner in which further proceedings should be conducted.

The initial submissions in compliance with this Order should be made by the responsible party by November 15, 1979, and the opposition will have until November 29 to respond.

NOTICE

TO ALL BLACK CURRENT AND FORMER EMPLOYEES OF TELETYPE CORPORATION (LITTLE ROCK) WHO WERE DEMOTED BY TELETYPE AT ANY TIME DURING THE PERIOD FEBRUARY 28, 1974, THROUGH DECEMBER 31, 1976.

In 1977, a lawsuit was filed against Teletype Corporation by Tommie Taylor and Larry C. Peyton. The suit is known as *Taylor* v. *Teletype Corporation,* 475 F.Supp. 958 (D.C.). The suit claimed that Teletype had discriminated against black employees because of race. Other black employees were allowed to intervene in the suit. The Court entered an order allowing those who filed suit to represent other black employees of Teletype who were demoted during the period February 28, 1974, through December 31, 1976.

If you claim that you were demoted by Teletype during this period of time because you are black, you may make such a claim, and the Court will consider it. You should file your claim in writing. You should state all facts of which you are aware which support your claim. You should make your claim in affidavit form and have it notarized. You should mail your claim, or carry it in person, to Mr. W. H. McClellan, Clerk, United States District Court, 4th Floor, United States Post Office and Courthouse Building, 600 W. Capitol, Little Rock, Arkansas, 72203. Your claim must be filed by February 4, 1980, or it will not be considered. If you have questions, or need assistance in filing your claim, you may ask John T. Lavey or Les Hollingsworth, attorneys for the persons who filed this suit. Their addresses and phone numbers appear below.

After March 3, 1980, the Court will consider all of the claims that have been filed. The Court may decide to hold a hearing and take testimony on some or all of the claims. Teletype will be given the opportunity to rebut each claim. Each claimant will receive notice from the Court when his or her claim is granted or denied.

Again, if you intend to file a claim, you must do so by February 4, 1980. Only claims of discriminatory demotion will be considered.

By the Court:

W. H. McCLELLAN,
DISTRICT CLERK

By:____________________________
Deputy Clerk

APPENDIX D

Tommie W. Taylor *et al.*,
Plaintiffs,

v.

Teletype Corporation,
Defendant,

James Bibbs *et al.*,
Intervenors.

No. LR-C-77-65.

United States District Court,
E. D. Arkansas, W. D.

June 27, 1980.

OPINION

ARNOLD, Circuit Judge.

The remaining issues in this case will be considered in turn.

I. Attorneys' fees.

John T. Lavey, who represents Tommie Taylor and Larry C. Peyton, individually and as class representatives, claims fees at the rate of $75 per hour and has worked 354.75 hours on this case. P. A. Hollingsworth, who represents the intervenors, individually and as class representatives, claims fees at the same rate and has worked 252.2 hours on the case. Mr. Hollingsworth's associate, Janet Pulliam, worked 24.8 hours on this case and asks compensation at the rate of $40 per hour. Finally, Ron Heller, a paralegal in Mr. Hollingsworth's office, has worked 65 hours and asks to be compensated at the rate of $15 per hour. The Court has considered the fee requests, the defendant's response, and the factors listed in *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974).

This case has been litigated with a high degree of skill, and the attorneys for the plaintiffs and intervenors are experienced lawyers. Although there has been some duplication of effort due to the involvement of both Mr. Lavey and Mr. Hollingsworth, it was unavoidable in the Court's judgment. Parties are entitled to secure representation by the attorney of their choice, and although one lawyer could have represented both the plaintiffs and intervenors, that was not the choice of the clients. Both lawyers' efforts contributed materially to the result, and it is not unusual in a case of this length and complexity for one side to have two lawyers at trial.

The attorneys ask that the fees requested be enlarged by 25% because of the complexity of the case, the time invested, and the contingent nature of the case. This request is denied. In the Court's opinion, the fees which will be awarded will be adequate to compensate for these factors.

Mr. Lavey and Mr. Hollingsworth will be compensated at the rate of $75 per hour for in-court time and $50 per hour for out-of-court time. The Court finds these rates to be consistent with the hourly rates charged by attorneys of similar experience.

This case has required the investment of large blocks of time, and that investment should be taken into account. The Court has also taken into account the results achieved for the plaintiffs, the intervenors, and the class; although the moving parties were not successful on all issues, their efforts resulted in a finding of discrimination against some of the named parties and against the class for certain years, and the employer has been enjoined from further discrimination in violation of Title VII.

With these considerations in mind, and in an effort to achieve a result consistent with *Brown* v. *Bathke*, 588 F.2d 634, 637 (8th

Cir. 1979) (counsel for prevailing parties should be compensated for all time reasonably expended on the matter), and *Zoll* v. *Eastern Allamakee Community School Dist.*, 588 F.2d 246, 252 (8th Cir. 1978) (minimum award generally should be no less than the number of hours claimed multiplied by the attorney's regular hourly rate), the Court makes the following fee award:

John T. Lavey. The Court has reviewed the hours itemized by Mr. Lavey and finds them to be reasonable, with three exceptions. Mr. Lavey specifies 7.5 hours for each day of trial; the Court is of the opinion that six hours for each trial day would be more appropriate, and this modification in the fee request will be made. Second, Mr. Lavey has itemized 12 hours expended on December 8, 10, and 11, 1979, and January 9 and 10, 1980, in conection with the defendant's appeal, and those hours will be deleted. Third, 8.5 hours on January 21, 26 and 27, 1980, expended in preparation of affidavits for class members, will be deleted because neither side has yet prevailed with regard to those claims. With these changes, Mr. Lavey is entitled to the following fee award.

Court time	71.5 hrs. x $75	= $5,362.50
Other time	248.75 hrs. x $50	= 12,437.50
Depositions		1,249.25
One-half fee for expert witness		500.00
Total fees and expenses		$19,549.25

P. A. Hollingsworth. Mr. Hollingsworth also claims 7.5 hours per day of trial, and this will be reduced to six. Additionally, 10.9 hours on December 7 and 10, 1979 and January 9, 10, 11, 12, 13, 14, and 15, 1980 attributable to the defendant's appeal will be deleted from the computation. Finally, 7.4 hours on December 11, 15, and 26, 1979, and January 2, 4, 5, and 7, 1980, expended in preparation of affidavits for class members, will be deleted. The Court has reviewed the hours claimed, and with these changes, the Court finds them to be reasonable. Mr. Hollingsworth is entitled to the following fee award:

Court time	71.5 hrs. x $75	= $5,362.50
Other time	139.4 hrs. x $50	= 6,970.00
One-half fee for expert witness		500.00
Total, fees and expenses		$12,832.50

Janet Pulliam. Ms. Pulliam worked 24.8 hours on this case, but only four of those hours came after she became licensed to practice on August 20, 1979, and two of those four were spent in preparation of affidavits for class members. She will be compensated at the rate of $30 per hour for two hours, and at a paralegal rate, $10 per hour, for the other 20.8 hours. She is entitled to the following fee award:

2 hrs. x $30	= 60.00
20.8 hrs. x $10	= 208.00
Total:	$268.00

Ron Heller. Mr. Heller worked 65 hours and claims reimbursement at the rate of $15 per hour. The Court believes that $10 per hour would be more appropriate, and the 8.5 hours spent giving assistance to class members will be subtracted. Other than these modifications, the hours claimed appear reasonable, and Mr. Hollingsworth's prevailing clients will be awarded $565.00 on Mr. Heller's behalf. This amount is an item of costs and should be considered as such rather than an attorneys' fee.

II. Back pay claims.

Tommie W. Taylor. On January 11, 1980, the Court found that Ms. Taylor would be entitled to what she would have earned at Teletype plus $2,850.91, minus her interim earnings in the amount of $34,487.54. This computation is accurate through November 2, 1979. Teletype has submitted a computation which shows that Ms. Taylor would have earned at Teletype through this date $54,687.16. Ms. Taylor has not challenged this calculation. Ms. Taylor does claim, however, that the back-pay award should include amounts she would have received as a member of the Bell System Employees Stock Ownership Plan; no claim for a specific amount of money or stock has been made, however, and the Court is unwilling to speculate on this element of relief. The claim relating to the stock ownership plan will therefore be denied. The Court finds that through November 2, 1979, Ms. Taylor is entitled to backpay in the amount of $23,050.53 ($54,687.16 plus $2,850.91 minus $34,487.54), and a judgment in this amount will be entered. The Court understands that Teletype has not offered reinstatement to Ms. Taylor, and its back-pay liability will continue to run until the date such an offer is made.

James Bibbs and Joseph Harris. In the Court's order of January 11, Teletype was directed to provide these intervenors with access to their pay records for the relevant periods of time. Teletype provided those records. Since that time, neither Mr. Bibbs nor Mr. Harris has challenged Teletype's claim that Harris is entitled to $949.60 and Bibbs $476.86. Judgment will be entered in these amounts.

Larry C. Peyton. The Court has considered the parties' conflicting submissions with respect to Mr. Peyton's entitlement to back pay, including the different methods of computing values that would have accrued to him under the Bell System Savings Plan. The Court finds that the method of computation suggested by defendant is reasonable and fair, with one exception. Mr. Peyton should not be charged with imputed interest at the rate of six per cent per annum in the amount of $484.26. Plaintiffs are not being awarded prejudgment interest on their claims, so prejudgment interest should not be taken into account in calculating the amount of mitigation that should reasonably have been achieved. The Court therefore awards to Mr. Peyton, for back pay through November 2, 1979, the sum of $663.22.

It may be helpful to describe the issues that this opinion does not decide. There remain pending 31 claims of class members, supported by affidavit, opposed in each case by defendant. The Court has examined the claims and oppositions and is unable to decide them without an evidentiary hearing. Issues of fact are raised that preclude disposition as on summary judgment. A hearing will therefore have to be set, probably by the United States District Judge who succeeds the undersigned, perhaps before a master. If the parties have views about the propriety of appointing a master to conduct such hearings, the Court would be happy to receive them. The attorney's fees that are awarded at this time do not include any time expended in connection with the Stage II claims. Whether plaintiffs are the prevailing parties with respect to these claims cannot be finally determined until the claims are adjudicated.

This Court has made a final disposition of all claims of the named plaintiffs and intervenors. The back-pay awards to Ms. Taylor and Mr. Peyton, it is true, have been computed only through November 2, 1979, and it is arguable that the amounts of these awards should be brought down to date before final judgment is entered. The better course, in this Court's opinion, is to delay no longer. An appeal by defendant, and perhaps by the losing plaintiffs, is highly likely. One appeal, by defendant from this Court's earlier order enjoining racial discrimination, is already pending, and a transcript of the trial has already been prepared. In this situation, if the judgment is affirmed, Ms. Taylor's and Mr. Peyton's back-pay awards will have to be recomputed anyway. If, on the other hand, the judgment is reversed, there will be no back-pay award to compute. In this situation, the Court finds, pursuant to Fed.R.Civ.P. 54(b), that it has made a final disposition of all of the individual claims, that there is no just reason for delay, and that the Clerk should enter judgment disposing of all of the claims of the named individuals. Such a judgment has been prepared and will be entered simultaneously with this opinion.

JUDGMENT

This case having come on for trial to the Court on July 24, 25, 26, 27, 30, and August 1, 2, 3, 6, 7, 8, 9, and 10, 1979; all parties having rested; this Court having filed its opinion dated August 29, 1979, containing findings of fact and conclusions of law; the defendant's motion to amend and add findings of fact having been denied by order dated September 25, 1979; the Court having entered orders granting injunctive and individual relief on November 5, 1979, January 11, 1980, and June 27, 1980; and the Court being well and sufficiently advised in the premises,

It is by the Court this 27th day of June, 1980, CONSIDERED, ORDERED, ADJUDGED, and DECREED:

1. That the complaints of Virginia S. Burke, Bowman M. Burns, Jr., Cato Conley, Jr., Earl Jones, William James Walker, Godfrey Hill, Ike Bolden, Will Simmons, James Walters, Jr., Ray Jackson, Fred Donnley, and Ray Kennard be, and they are hereby, dismissed with prejudice.

2. That the plaintiff Tommie W. Taylor have and recover of and from the defendant Teletype Corporation judgment in the amount of $23,050.53, representing back pay to and including November 2, 1979.

3. That the plaintiff Larry C. Peyton have and recover of and from the defendant Teletype Corporation judgment in the amount of $663.22, representing back pay to and including November 2, 1979.

4. That the intervenor James Bibbs have and recover of and from the defendant Teletype Corporation judgment in the amount of $476.86 representing back pay.

5. That the intervenor Joseph Harris have and recover of and from the defendant Teletype Corporation judgment in the amount of $949.60 representing back pay.

6. That the defendant Teletype Corporation be, and it is hereby, ordered and directed to offer reinstatement to the plaintiff Tommie W. Taylor to the position of 910 public relations representative or a comparable position, the comparability of another position to be judged according to pay, responsibility, the opportunity for creativity and independent judgment, advancement, and similar factors; and that plaintiff Taylor have and recover judgment of and from the defendant Teletype Corporation in whatever additional amount may be appropriate to make her whole for losses incurred between November 2, 1979, and the date she is offered the position of 910 public relations representative or a comparable position, this amount to be computed in accordance with submissions of the parties to be made at the appropriate time.

7. That the defendant Teletype Corporation be, and it is hereby, ordered and directed to offer reinstatement to the plaintiff Larry C. Peyton to the position of engineering associate; and that plaintiff Peyton have and recover judgment of and from defendant Teletype Corporation in whatever additional amount may be appropriate to make him whole for losses incurred between November 2, 1979, and the date he is offered the engineering associate position, this amount to be computed in accordance with submissions of the parties to be made at the appropriate time.

8. That the defendant Teletype Corporation, its agents, servants, and employees, be, and they are hereby, permanently enjoined and restrained from discriminating against any individual with regard to his or her compensation, terms, conditions, and privileges of employment, or in any other manner, because of such individual's race.

9. That the plaintiffs and the prevailing intervenors have and recover of and from the defendant Teletype Corporation in the amount of their costs expended in this action, including attorneys' fees, in the following amounts: for John T. Lavey,

Esq., $19,549.25; for P. A. Hollingsworth, Esq., $12,832.50, plus $565.00 paralegal costs; and for Janet Pulliam, Esq., $268.00.

10. That all monetary awards bear interest at the rate of ten per centum per annum from and after the date of the entry of this judgment (except the award to be computed in the future under paragraphs 6 and 7 of this judgment), but with no addition for pre-judgment interest, since the fact and amount of defendant's liability could not be reasonably ascertained until this Court had ruled.

11. That this judgment is without prejudice to the rights of class members who filed claims during the period of time specified by the Court and who are not mentioned herein.

12. This judgment is a final disposition of the claims of all named plaintiffs and intervenors. There is no just reason for delay. The Clerk is directed to enter this judgment under Fed.R.Civ.P. 54(b).

For all of which let execution issue, at the time and in the manner provided by law.

APPENDIX E

Nathaniel Hoard,
Plaintiff,

v.

Teletype Corporation,
Defendant,

Richard Davis,
Plaintiff-Intervenor.

Civ. No. LR-74-C-381.

United States District Court,
E. D. Arkansas, W. D.

May 8, 1978.

HEANEY, District Judge, by designation.

FINDINGS OF FACT

1. The plaintiff Nathaniel Hoard is black. He was employed by the defendant Teletype Corporation from November 8, 1965 until his discharge on October 16, 1972. He is an appropriate class representative for a Rule 23(b)(2) class consisting of all black employees who allege that they were discharged on account of race by Teletype from December 3, 1971 to September 6, 1977.

2. Richard Davis is black. He has been employed by Teletype since March 16, 1964. He was permitted to intervene by this Court on June 3, 1977. He is an appropriate class representative for all black employees currently employed by Teletype who allege that they were denied promotions to higher ranking positions or denied assignments to jobs paying a higher rate of pay

on account of race since December 3, 1971. The higher ranking positions and jobs to which the class alleges it has been denied promotion or assignment to are as follows:

Grades 95 to 98 inclusive.

Job Setters and Machine Setters.

Trade Groups I and Trade Groups II, excluding electricians, toolmakers and any other positions established by the record to be hired primarily from the outside.

Grades 505 to 510 inclusive.

The EA (Engineering Associates).

The Ungraded Series (UG1 to UG3 inclusive) and other professionals, excluding those hired primarily from outside Teletype's work force.

Section Chiefs.

Department Chiefs.

This is a definable class, all of the members can be identified by name. The number in the class is so numerous that joinder is impracticable. The claims of each member of the class involve common questions of law and fact. The challenged practice of not promoting black employees because of their race affects each member of the class in a comparable manner. The claim of the named plaintiff is typical of the claims of the class and the named plaintiff has fairly and adequately represented the interests of the class.

3. Teletype Corporation is an employer within the contemplation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. It is a wholly owned subsidiary of Western Electric which in turn is a wholly owned subsidiary of American Telephone and Telegraph. It has operated a plant in Little Rock, Arkansas since 1957. At all times material to this action,

Teletype has been an employer within the contemplation of 42 U.S.C. § 2000e(b). Since 1970, the work force has varied from a low of 1,200 to the present high of 2,200.

4. Burlon Joiner and Alma Gipson, black discharged employees of Teletype, petitoned to intervene as plaintiffs on October 12, 1977. Permission was subsequently granted.

5. The following black employees who had been discharged by Teletype between December 3, 1971 and September 6, 1977, affirmatively opted into Class I:

Wanda McKee
Violet Allen
Sharon Greene
Paulette Hinton
Diane McGhee
Barbara Surratt
Glenn Robinson
James Wiggins
Lewis Henderson
Raymond Trice

The class of discharged employees was limited by the Court to Nathaniel Hoard and those individuals listed in paragraphs 4 and 5.

6. When the Teletype plant was opened in Little Rock in 1957, it did not hire any blacks as production employees, clerical employees, or employees in any of the categories set forth in paragraph 2. The only blacks that it hired were employed as janitors.

7. The first black employed by Teletype in a position other than as a janitor was hired in 1960. By July 1, 1962, one black was employed in a clerical position, five blacks were employed in production positions in grades 91 through 93, and no blacks were apparently employed in higher positions. As of July 30, 1964, only 28 or 7% of the 393 employees were black. Of these,

two were clerical employees, three were janitors, twenty were unskilled production employees, and three were semiskilled production employees.

8. There were blacks living in Little Rock at the time the plant was opened and through 1964 who were qualified for most positions in the company, including production, craft, clerical, professional and supervisory positions. At the time of the enactment of Title VII, blacks were underrepresented in most classifications in the work force at Teletype.

9. Race was a factor in the failure of Teletype to employ blacks other than in janitorial positions in the plant until 1960.

10. Teletype had no affirmative action plan to bring qualified blacks into its Little Rock plant until 1970 when Lafayette Morrison, the Equal Employement Opportunity Coordinator, was sent from the Teletype plant in Skokie, Illinois, to initiate the writing and implementation of an affirmative action plan. Between 1970 and the time of trial, Morrison made 23 visits to Little Rock to assist in affirmative action activities. No EEO coordinator was appointed for the Little Rock plant until 1971. The EEO coordinators apointed by Teletype for the Little Rock facility, were not properly trained or given adequate direction and support, and were unable to provide an effective affirmative action program.

11. At the time of trial, of the 119 blacks hired between 1971 and 1974, twenty or 16.5% had advanced to grade 94; six or 5% had advanced to grade 95; and only two or 1.7% were employed at grade levels above 95.

12. At the time of trial, of the 281 whites hired from 1971 to 1974, 47 or 17% advanced to grade 94; ten or 4% had advanced to grade 95; and 24 or 8.5% had advanced to grades above 95.

13. At the time of trial, of the 119 blacks hired between 1971 and 1974, only four were hired into positions above grade 93.

Of the 281 whites hired during the same period, 45 were hired into positions above grade 93.

14. At the time of trial, Teletype employed one vice president, two managers and three assistant managers. No black has ever been employed by Teletype in any of those positions.

15. At the time of trial, Teletype employed 22 department chiefs. No black has ever been employed in this position.

16. At the time of trial, Teletype employed 63 section chiefs of whom only five are black. The first black was employed as a section chief in 1970. The second black so employed was the intervenor Richard Davis in 1971.

17. At the time of trial, Teletype employed approximately 45 persons as designers and engineers. These are considered professional positions and most persons holding such positions have appropriate college degrees. Teletype has never employed a black in these positions.

18. At the time of trial, Teletype employed approximately 100 persons in the trade group classifications. Included in these classifications are approximately 50 toolmakers, fifteen electricians, four water and waste treatment plant operators, and three test set makers. Only five blacks are presently employed in the trade group job classifications.

19. At the time of trial, there were 396 employees in grades 95 through 98 of whom 73 or 18.4% were black, and 323 or 81.6% were white.

Grade	White Employees	% White Employees	Black Employees	% Black Employees	Total Employees
95	158	78.6	43	21.4	201
96	53	75.7	17	24.3	70
97	102	88.7	13	11.3	115
98	10	100	0	0	10
	—	——	—	——	—
TOTAL in Grades 95-98	323	81.6	73	18.4	396

---

20. Since September 18, 1959, the International Brotherhood of Electrical Workers (IBEW) has been the certified collective bargaining representative for hourly rated production and maintenance employees, excluding clerical and professional employees, watchmen, guards and supervisory employees. Under the terms of the collective bargaining agreement, seniority is a factor but is not controlling in movement of employees within the bargaining unit. In grades 91 and 92, there is plant-wide seniority. In grade 93 experience in a related area is also important and in grades 94 through 98, TGI and TGII experience in a specific production line is important. Within a labor grade, advancement from one pay rate to another is automatic. Management retains final approval of movement within the production unit.

21. In 1970, blacks constituted 18.5% of the population in the Little Rock-North Little Rock Standard Metropolitan Statistical Area (SMSA). U.S. Bureau of the Census, Census of the Population: 1970, Vol. 1, CHARACTERISTICS OF THE POPULATION, Arkansas, Part 5, Table 174, p. 632. In 1976, blacks constituted 15.5% of the civilian labor force over sixteen years of age and older in the Little Rock-North Little Rock SMSA. Arkansas Employement Security Division, *Manpower Information for Affirmative Action Programs* (1977).

22. The following statistical chart was prepared by the defendant and is reasonably representative of data submitted by the

defendant for the purpose of showing that since 1970 Teletype has employed blacks in the classifications shown in a ratio reasonably related to the blacks in the community available and qualified for such positions:

	% Black Availability	1970-1977 % Black Employment	1977 % Black Employment
Manager	2.95	3.07	4.82
Professional	2.09	2.56	2.38
Technical	4.19	7.09	5.88
Clerical	6.38	10.29	11.96
Craft	8.20	4.03	6.94
Operative	26.53	23.39	27.33
Service	32.48	0	0
Overall	21.15	18.35	21.51

This chart, and others like it received in evidence, while probative, is not entitled to controlling weight on the question of whether blacks were discriminated against in hiring or promotions from 1970 to the time of trial. The categories are too broad to be determinative in this case. For example, the category "managers" includes all supervisors from section chief to vice president, even though no blacks have held supervisory positions above that of section chief. The category "professional" includes all professionals from administrative nonsupervisory employees (ANSE) to accountants, designers and no blacks have held the latter professional positions.

23. Teletype continued to discriminate against blacks in hiring in all positions other than service, clerical, and operative positions below grade 95 until at least 1971. Thereafter, and until the commencement of this action, it hired more blacks into operative positions and employed some blacks in trade group, technician and lower grade professional positions but continued to discriminate against blacks in hiring with respect to higher

grade professional and supervisory positions. There is insufficient evidence to establish that discrimination in initial hiring continued after the commencement of this action.

24. Teletype uniformly discriminated against blacks with respect to promotions above grade 95 and to supervisory positions until approximately 1970. Thereafter, it promoted a few blacks to section chief and to grades 96 through 98, but it continued to discriminate against most blacks with respect to promotion to supervisory positions or to grades above 95 until the commencement of this action. The discrimination cannot be explained or justified by the seniority provisions of the collective bargaining agreement or the seniority practices of the company.

25. Violet Allen, Sharon Greene, Paulette Hinton, Diane McGhee, Barbara Surratt, Glenn Robinson, James Wiggins, Lewis Henderson and Raymond Trice were discharged by Teletype for reasons unrelated to their race.

26. Nathaniel Hoard was first employed by Teletype on November 1, 1965 as a bench hand in grade 91, the lowest production job classification. He was paid $1.44 per hour. At the time of his employment he had completed high school and nearly four years of college. He performed satisfactorily as an employee and advanced from grade 91 to grade 95. On April 3, 1972, Hoard was downgraded to a grade 94. Beginning in May of 1972, Hoard received written warnings for absenteeism, poor work, and inefficiency. He was terminated on October 16, 1972. Had it not been for his race, Hoard would, in the light of his educational qualifications, have been hired at a higher grade and would have advanced more rapidly. While this treatment by Teletype was demeaning and may well have played a part in his generally unsatisfactory record immediately prior to his discharge, the evidence does not clearly establish that this was the case. Hoard was not discharged because of his race.

27. Burlon Joiner was terminated for reasons unrelated to his race.

28. Alma Gipson and Wanda McKee were allegedly terminated because of absenteeism and tardiness. Both were frequently absent and tardy, but their records in these respects were not as bad as white employees holding similar positions. Moreover, the absence control program was confusing and not communicated or understood by many of the employees, and was not enforced equally as to blacks and whites. Race was a factor in the discharge of Gipson and McKee. I specifically credit the testimony of the two employees that white employees in their departments were not written up for absenteeism similar to those for which they were written up, and that whites with worse absentee or tardiness records were not suspended or discharged.

29. The parties have stipulated that the individual claims and actions of Nathaniel Hoard, Burlon Joiner, Alma Gipson and Wanda McKee may be dismissed without prejudice.

30. Richard Davis was initially employed by Teletype on March 16, 1964, as a grade 91 bench hand at a salary of $1.33 an hour. During his employment at Teletype, he attended the Arkansas Baptist College and received a bachelor's degree in social science in 1973. He is an intelligent and articulate man. He has a very good record for efficiency, dependability and attendance. Davis is highly motivated. He has ambition to succeed with the company and to advance to higher management positions, and has done everything possible to fit himself for such promotions. By August 25, 1969, he had reached the grade of 97. On February 1, 1970, he was named a section chief. He was an able and effective section chief and totally a loyal and dedicated employee. He was the second black in the history of Teletype's Little Rock plant to be promoted to that position. On July 6, 1970, he was downgraded from a section chief to an ungraded position as a buyer associate. He was subsequently downgraded in steps to a grade 95. This downgrading was not racially motivated, but was instead the result of a substantial reduction in force. Davis was reappointed from grade 95 to a

section chief on June 15, 1975. He continued in that position until February 19, 1975 when he was downgraded to a grade 97. Until the time of trial, he had not been promoted to section chief, even though more than one vacancy occurred. Race was a factor in his demotion on February 19, 1975 and in the failure of Teletype to repromote him to section chief when vacancies occurred. The testimony of Teletype witnesses is specifically discredited with respect to alleged deficiencies in Davis's work after his reappointment to section chief in June of 1975.

31. The record as a whole, including the testimony of Lafayette Morrison, established that Teletype moved slowly over the years in providing promotional opportunities for blacks. Initially it hired them only in the very lowest categories. Over the years it expanded their opportunities, but race remained a factor in promotional policies from the time the plant opened in 1957 until the date of trial. While more and more jobs were open to blacks, some positions were still denied them as of the date of trial.

CONCLUSIONS OF LAW

1. The Court has jurisdiction herein by virtue of 42 U.S.C. § 2000e *et seq.*, 28 U.S.C. § 1343, and 42 U.S.C. § 1981.

[1] 2. A Rule 23(b)(2) class (Class I), consisting of all black employees discharged on account of race from Teletype's Little Rock plant from December 3, 1971 to September 6, 1977 is a proper one, and plaintiff Nathaniel Hoard is an appropriate class representative. In the interest of the fair conduct of the action, Fed.R.Civ.P. 23(d)(2), notice was required to be given to all employees in Class I.

3. The plaintiffs have failed to establish that Violet Allen, Sharon Greene, Paulette Hinton, Diane McGhee, Barbara Surratt, Glenn Robinson, James Wiggins, Lewis Henderson and Raymond Trice, were discharged on account of or by reason of

their race and the defendant is entitled to a judgment with respect to them.

4. The claims of Nathaniel Hoard, Burlon Joiner, Alma Gipson and Wanda McKee shall be dismissed with prejudice pursuant to the stipulation of the parties. The findings that race was a factor in the discharge of Gipson and McKee, and that race was a factor in the failure to promote Hoard are relevant only insofar as they tend to establish that Teletype discriminated against black employees with respect to discharge and promotion.

[2] 5. A prima facie case of discrimination with respect to Class I has not been made. While there is evidence in the record to indicate that Teletype's absence control program has not always been operated without regard to race, the instances were not so pervasive to require that injunctive relief be granted, and appear to have been eliminated by the time of trial.

[3] 6. A Rule 23(b)(2) class (Class II), consisting of all black employees employed by Teletype at its Little Rock plant as of September 6, 1977 who had been denied promotions to the positions listed below on account of race since December 3, 1971 is proper, and Richard Davis is an appropriate class representative:

Grades 96 to 98 inclusive.

Job Setters and Machine Setters.

Trade Groups I and Trade Groups II, excluding electricians, toolmakers and any other positions established by the record to be hired primarily from the outside.

Grades 505 to 510 inclusive.

The EA (Engineering Associates).

The Ungraded Series (UG1 to UG3 inclusive) and other professionals, excluding those hired primarily from outside Teletype's work force.

Section Chiefs.

Department Chiefs.

[4] 7. A prima facie case of discrimination has been established with respect to the following job classifications in Class II:

Grades 97 and 98.

Section Chiefs.

Department Chiefs.

Teletype has failed to rebut the prima facie case with respect to the above listed job classifications.

8. Teletype did satisfy their burden of proof with respect to the remaining job classifications in Class II as originally certified.

[5] 9. Richard Davis, as a member of Class II, is entitled to relief. He is entitled to back pay from February 19, 1975 to the date he is reinstated to the position of section chief. The back pay is to be computed on the basis of the difference between what he would have earned as a section chief and the amount he did earn. Moreover, he is to be reinstated as a section chief when the first vacancy occurs in a section in which he has had prior experience. Teletype is enjoined from discriminating against Davis in the future with respect to his future advancement in the company.

[6] 10. Teletype is enjoined from discriminating against black employees with respect to promotions to the job classifications listed in paragraph 7 of the conclusions of law. To effectuate the terms of this injunction, Teletype shall promptly adopt standards, which shall be primarily objective in nature, for promotion to those job classifications. The standards shall be promptly submitted to counsel for Class II members for their approval. The parties may request the assistance of the EEOC in the promulgation of the standards. If the parties are unable to agree, they shall request the Court to review the proposed standards.

The new standards for promotion to those job classifications shall be posted or otherwise made available to all employees.

11. Black employees of Teletype as of September 6, 1977, who claim that they were denied promotion to one of the job classifications set forth in paragraph 7 of the conclusions of law, prior to that date on account of race, and who were employed as of that date in grades 96 and above, and in equivalent ranking positions, are herewith given an opportunity to present their claims to this Court. Such employees shall be given appropriate notice of their opportunity to file claims within ten days of the date judgment is entered. Each claim must be presented to this Court within 60 days of the date that judgment is entered and must be accompanied by detailed affidavits setting forth the basis of the claim. Teletype shall have a period of 30 days thereafter to file counter affidavits. If requested by either party, the Court will take oral testimony to supplement the affidavits. Should Teletype fail to rebut an individual employee's claim of discrimination, the employee shall be entitled to an appropriate award of back pay and to promotion to available vacancies in accordance with an order to be entered by this Court.

12. The Court awards attorney's fees in the sum of $2,000 to Richard Mays, and $2,000 to Les Hollingsworth as counsel for the prevailing parties in a Title VII action. 42 U.S.C. § 2000e-5(k). These fees are to compensate counsel for all services rendered to date in this matter. The Court specifically instructed counsel for the plaintiffs to submit a request for additional attorney's fees with documentation at the time they submitted their proposed findings of fact and conclusions of law. They have not done so. Counsel may submit a documented request for additional attorney's fees arising with respect to future proceedings in this matter before this Court.

13. Judgment will be entered in accordance with these findings of fact, conclusions of law and memorandum.

MEMORANDUM

On December 3, 1974, Nathaniel Hoard filed this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981, alleging that Teletype Corporation discriminated on the basis of race. The action was brought in the District Court for the Eastern District of Arkansas. Richard Davis was permitted to intervene in this action by an order granted by Judge G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas and filed June 3, 1977. Burlon Joiner and Alma Gipson filed a motion to intervene on October 12, 1977, which was granted by the Court.

The action was denominated as a class action, the existence of a class was pleaded in the complaint and class certification was sought. After a preliminary hearing, this Court conditionally certified the two classes set forth in paragraphs 1 and 2 of the findings of fact as proper classes under Fed.R.Civ.P. 23. This Court found that the requirements of numerosity, the predomination of common questions of law or fact, typicality of claims and defenses, and adequacy of representation of Fed.R.Civ.P. 23(a)(1)-(4) were satisfied. *See generally Donaldson* v. *Pillsbury Co.*, 554 F.2d 825 (8th Cir. 1977); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1976); Schlei & Grossman, *Employment Discrimination Law* 1095-1107 (1976). The Eighth Circuit has stated that,

> [w]e are committed to the proposition that Rule 23 should be liberally construed to effectuate the remedial policy of Title VII since the conduct therein proscribed is discrimination against a class characteristic.

Wright v. *Stone Container Corp.*, 524 F.2d 1058, 1061-1062 (8th Cir. 1975). The class action is appropriately brought pursuant to Fed.R.Civ.P. 23(b)(2) which provides for class actions where

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Mandatory notice is not required for Rule 23(b)(2) class actions. By its terms, the mandatory notice provision only applies to 23(b)(3). *See Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). However, notice may be given under Rule 23(d)(2).

[7] The plaintiffs have the burden of establishing a prima facie case of discrimination. There is no "inflexible formulation" of what constitutes a prima facie case; it varies with respect to differing factual situations. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 358, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 n. 13, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Williams* v. *Anderson,* 562 F.2d 1081, 1088 (8th Cir. 1977). In this case, the plaintiffs sought to establish claims of disparate treatment. In such cases, proof that a discriminatory motive was a motivating factor is required though it need not be established that the discriminatory purpose was the sole motivating factor. *See Arlington Heights* v. *Metro. Housing Corp.,* 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (19777). A discriminatory motive in some cases can be inferred from the mere fact of differences in treatment. *See International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 335 n. 15, 97 S.Ct. 1843; *Arlington Heights* v. *Metro. Housing Corp., supra,* 429 U.S. at 265-266, 97 S.Ct. 555. It has been recognized that admission of discriminatory intent is unlikely and such intent will ordinarily have to be found by "a sensitive inquiry into such circumstantial and direct

evidence of intent as may be available," *Arlington Heights* v. *Metro. Housing Corp., supra* at 266, 97 S.Ct. at 564, including the impact, the historical background and individual instances of discrimination. *See Williams* v. *Anderson, supra* at 1086-1087. Once a prima facie case of discriminatory treatment is established, then the burden of proof shifts to the defendants. *See International Brotherhood of Teamsters* v. *United States, supra.*

On the basis of the record as a whole, this Court has found that the plaintiffs failed to establish a prima facie case of discrimination with respect to Class I, the class of employees allegedly discharged on the basis of race. While this Court did find that the absence control program was not always equally enforced as to blacks and whites and that race was a factor in the discharge of two employees, Alma Gipson and Wanda McKee, who were discharged for absences, these findings alone are not enough to establish a prima facie case. Moreover, since the claims of Gipson and McKee were dismissed with prejudice pursuant to a stipulation by the parties, the findings with respect to Gipson and McKee are relevant only insofar as they tend to establish a discriminatory motive on the part of Teletype.

The Court has further held that on the basis of the record as a whole, the plaintiffs established a prima facie case of discrimination with respect to Class II. However, Teletype satisfied its burden of proof of rebutting the prima facie case except with respect to promotions to grades 97 and 98, section and department chief. The record reveals that at the time Teletype's Little Rock plant opened, blacks were only employed as janitors. At the time Title VII was enacted in 1964, blacks were significantly underrepresented in the work force at Teletype. Moreover, this Court found that the failure of Teletype to employ more blacks was because of an intent on the part of Teletype to discriminate against blacks. This finding of an intent to discriminate is further supported by the failure of Teletype to adopt an affirmative action plan until 1970 and its failure to appoint and support an effective EEO coordinator at the Little Rock plant. The prima facie case is also supported by evidence that at the time of trial, black employees hired during 1971-1974 had not advanced as rapidly into grades above 95; and that during the same period, only four blacks were hired into grades above 93, while 47 whites were hired into grades above 93. The prima facie case is further supported by evidence that at the time of trial, no blacks had ever been managers, assistant managers and department chiefs; only five, or 7.9% of the 63 section chiefs were black; no blacks were in grade 98; and only thirteen, or 11.3%, of 115 employees in grade 97 were black. The prima facie case is also supported by the findings that race was a factor in the demotion and failure to repromote Richard Davis to the position of section chief. The prima facie case is finally supported by the testimony showing that the absence control program was not always equally enforced with respect to blacks and whites.

[8,9] As this Court found, Teletype did meet its burden of proof with respect to promotions to job classifications other than to grades 97 and 98, section and department chiefs. It principally sought to rebut the prima facie case of disparate treatment of blacks with respect to promotions to the above listed categories by arguing that it resulted from the operation of a bona fide seniority system which resulted in perpetuation of discrimination occurring before the effective date of Title VII, July 2, 1965. This Court cannot agree that the discrimination can be explained on the basis of the seniority provisions of the collective bargaining agreement or the seniority practices of the company. While seniority is a significant factor in the promotion of employees, it is not the controlling factor under the collective bargaining agreement, nor is it the only factor considered by Teletype with respect to promotion to management. *See International Brotherhood of Teamsters* v. *United States, supra.* Teletype also sought to rebut the prima facie case with statistics of black availability. Grades 97 and 98 are craft positions; and from the chart offered by the defendants and reprinted in finding of fact No. 22, it appears that Teletype has hired a lower percentage of blacks than are available in the relevant work force from 1970 to 1977. Section and department chiefs are managerial positions. The black availability for such positions is low; and from 1970-1977, Teletype had employed about the same percentage of black managers as were available in the relevant labor market. However, most black managers were promoted by Teletype in the later part of that time period, and blacks were only promoted into the lower-level managerial positions. Thus, the statistics as to black availability do not rebut the prima facie case with respect to grades 97 and 98, section and department chiefs.

Finally, the defendants seek to meet their burden with the following statement made by Richard Davis in his deposition and introduced into evidence at trial:

> Q. Outside of yourself, do you know of any black person that was entitled to a promotion that didn't get it?
>
> A. No.

This statement alone cannot be given substantial weight. Davis was not in a position to know about the capabilities and qualifications of all of Teletype's 2,200 employees, many of whom worked on different shifts and in different sections and departments.

In summary, the plaintiffs have established a prima facie case of racial discrimination with respect to promotions to grades 97 and 98, and to section and department chiefs which the defendant has not rebutted.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 79-2027 and 80-1681

September Term, 1980

Tommie W. Taylor, et al.,
Appellees,

vs.

Teletype Corporation,
Appellant.

Appeals from the United States
District Court for the
Eastern District of Arkansas.

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judge Arnold did not participate in these appeals.

June 3, 1981

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79-2027
No. 80-1681

Tommie W. Taylor, Larry C. Peyton, James H. Bibbs, Ike Bolden, Virginia Burke, Bowman Burns, Jr., Fred Donley, Ray Jackson, Ray Kennard, Will Simmons, William Walker, James Walters, Jr., Cato Conley, Joseph Harris and Earl Jones, Godfrey Hill,

Appellees,

v.

Teletype Corporation,

Appellant.

No. 80-1658

Tommie W. Taylor; Virginia S. Burke; Earl Jones and William Jones Walker,

Appellants,

v.

Teletype Corporation,

Appellee.

Appeals from the United States
District Court for the Eastern
District of Arkansas.

Filed: June 15, 1981

ORDER ON REHEARING

In response to the petition for rehearing filed by appellees/cross-appellants, Tommie W. Taylor, *et al.*, the following changes are made:

1) Page 2, second paragraph, add the following sentence:

> On June 27, 1980, the court entered judgment on the individual claims and made certain awards of backpay, reinstatement, and attorney's fees. *Taylor* v. *Teletype Corp.*, 492 F. Supp. 405 (E.D. Ark. 1980).

2) Page 2, third paragraph, should read as follows:

> In No. 79-2027, an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1), Teletype challenges the injunction and the findings of discrimination in the class and individual claims. In No. 80-1681, Teletype appeals the individual relief awarded to Tommie Taylor and Larry Peyton and the award of attorney's fees. Four of the unsuccessful individual claimants cross-appeal in No. 80-1658. We affirm the district court findings regarding discrimination in the class and individual claims in all but one case, vacate the permanent injunction, and remand for further proceedings.

3) Page 20, subdivision VI is modified to read as follows:

> VI. *Attorney's Fees.*
>
> Teletype also appeals the district court's award of attorney's fees to plaintiffs and intervenors. Because the

award may be modified in light of our vacating the permanent injunction and because the total amount of the award cannot be fixed until the claims of all the individual class members have been decided, we do not consider the award to be a final order subject to review at this time. We, therefore, dismiss the appeal on this issue without prejudice.

In accordance with the foregoing order, pages 2 and 20 of the slip opinion dated May 1, 1981, are withdrawn and revised pages 2 and 20 embodying changes are substituted therefor and are attached hereto.

In all other respects, the petition for rehearing is denied.

We have also examined the petition for rehearing filed by Teletype Corporation. That petition is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

BRIGHT, Circuit Judge.

Tommie Taylor and Larry Peyton brought this action against Teletype Corporation (Teletype or the Company) alleging racial discrimination in the demotion of Company employees, in violation of Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e *et seq.* (1976). The district court permitted fourteen individuals to intervene and certified a class, comprised of all black employees who were demoted after February 28, 1974, designating these intervenors and the two named plaintiffs as the class representatives.

On August 29, 1979, the district court[1] determined that appellees had established a prima facie case of classwide discrimination for the years 1974 through 1976 but had failed to prove discrimination for the years 1977 through 1979. *Taylor* v. *Teletype Corp.*, 475 F. Supp. 958 (E.D. Ark. 1979). The district court also resolved the claims of the sixteen class representatives, finding discrimination in four of the cases. By its order of November 2, 1979, the court issued a permanent injunction against Teletype and ordered reinstatement of the four successful individuals with backpay. *Taylor* v. *Teletype Corp.*, 478 F. Supp. 1227 (E.D. Ark. 1979). On June 27, 1980, the court entered judgment on the individual claims and made certain awards of backpay, reinstatement, and attorney's fees. *Taylor* v. *Teletype Corp.*, 492 F. Supp. 405 (E.D. Ark. 1980).

In No. 79-2027, an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1), Teletype challenges the injunction and the findings of discrimination in the class and individual claims. In No. 80-1681, Teletype appeals the individual relief awarded to Tommie Taylor and Larry Peyton and the award of attorney's fees. Four of the unsuccessful individual claimants cross-appeal in No. 80-1658. We affirm the district court findings regarding discrimination in the class and individual claims in all but one case, vacate the permanent injunction, and remand for further proceedings.

* * * * *

VI. *Attorney's Fees.*

Teletype also appeals the district court's award of attorney's fees to plaintiffs and intervenors. Because the award may be modified in light of our vacating the permanent injunction and because the total amount of the award cannot be fixed until the claims of all the individual class members have been decided, we do not consider the award to be a final order subject to review at this time. We, therefore, dismiss the appeal on this issue without prejudice.

---

[1] The Honorable Richard S. Arnold, then serving as United States District Judge for the Eastern District of Arkansas.

VII. *Cross-Appeal.*

Tommie Taylor,[26] Virginia S. Burke, Earl Jones, and William James Walker appeal the district court's dismissal of their claims. Having fully reviewed the record, we conclude that Teletype successfully rebutted the four individual prima facie cases. Thus, we affirm the dismissal of these claims.

Only Taylor's claim merits extended comment.[27] Teletype advanced three nondiscriminatory reasons to rebut Taylor's prima facie case of discrimination in her demotion from Industrial Relations Associate (ANSE 2) to grade 910: Taylor's poor job performance in drafting the 1975 Affirmative Action Plan; her unauthorized absence on March 24, 1975, despite her superior's order not to take the day off; and the plant-wide layoffs required by worsening economic conditions. The district court found that these reasons existed in fact and were not pretextual. We affirm these findings.

* * * * *

---

[26] Taylor's cross-appeal concerns her first demotion from industrial relations associate to a 910 public relations representative.

[27] We note that the cross-appellants' brief contains no arguments relating to the appeals of Burke, Jones, and Walker.

APPENDIX H

OTHER SUBSIDIARIES AND AFFILIATES

Other subsidiary and affiliate companies of American Telephone and Telegraph Company are: New England Telephone and Telegraph Company, The Southern New England Telephone Company, New York Telephone Company, Empire City Subway Company (Limited), New Jersey Bell Telephone Company, the Bell Telephone Company of Pennsylvania, the Diamond State Telephone Company, the Chesapeake and Potomac Telephone Company, the Chesapeake and Potomac Telephone Company of Maryland, the Chesapeake and Potomac Telephone Company of Virginia, the Chesapeake and Potomac Telephone Company of West Virginia, Southern Bell Telephone and Telegraph Company, South Central Bell Telephone Company, the Ohio Bell Telephone Company, Cincinnati Bell, Inc., Michigan Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Wisconsin Telephone Company, Illinois Bell Telephone Company, Northwestern Bell Telephone Company, Southwestern Bell Telephone Company, The Mountain States Telephone and Telegraph Company, Malheur Home Telephone Company, Pacific Northwest Bell Telephone Company, the Pacific Telephone and Telegraph Company, Bell Telephone Company of Nevada, Bell Telephone Laboratories, Incorporated, AT&T International, Inc., American Bell, Inc., Western Electric International, Incorporated, AT&T International Far East Limited, 195 Broadway Corporation, American Bell International, Inc., Transpacific Communications, Incorporated, Transoceanic Cable Ship Company, Inc., Manufacturers' Junction Railway Company, Nassau Recycle Corporation and Sandia Corporation.

Opposition

81-512

No. 81-152

Office - Supreme Court, U.S.
FILED
OCT 13 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TELETYPE CORPORATION,
Petitioner,

v.

TOMMIE W. TAYLOR, LARRY C. PEYTON, JAMES H. BIBBS
and JOSEPH HARRIS,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN T. LAVEY
P.O. Box 2657
Little Rock, AR 72203
501-376-2269

PERLESTA A. HOLLINGSWORTH
900 Tower Building
Little Rock, AR 72201
501-374-3785
Attorneys for Respondents

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Did the Eighth Circuit err when it affirmed the trial court's finding and conclusion that respondents had established a *prima facie* case of classwide discrimination with respect to black employees petitioner demoted between February 28, 1974 and December 31, 1976?

2. Are respondents' attorneys entitled to a court awarded attorneys' fee to be paid by petitioner for the preparation of this brief in opposition?

INDEX

Page

Questions presented for review i

Statutory provisions involved vi

Statement of the case 1

Argument: Reasons for denying the writ.

I. The decision of the Eighth Circuit does not conflict with *Teamsters* 9

II. The decision of the Eighth Circuit does not conflict with *Rodriguez* 15

III. The decision of the Eighth Circuit does not conflict with decisions of other courts of appeal 15

IV. The decision of the Eighth Circuit does not conflict with its *Greenholtz* decision 20

V. This Court's decision in *Burdine* is inapposite 21

VI. The attorneys for the respondents are entitled to a court awarded attorneys' fee to be paid by petitioner 22

Conclusion 22

Table of Cases

Booth v. Board of Directors of National American Bank, 475 F.Supp. 638 (E.D. La. 1979) 18

Donaldson v. The Pillsbury Company, 554 F.2d 825 (8th Cir. 1977) 14

East Texas Motor Freight, Inc. v. Rodriguez, 431 U.S. 395 (1977) 15

Hoard v. Teletype Corporation, 450 F.Supp. 1059 (E.D. Ark. 1978) 2,3,4,6,9,10,15

Inmates of the Nebraska Penal and Correctional Complex v. Greenholtz, 567 F.2d 1368 (8th Cir. 1977) .. 20,21

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)................9,11,13,15,19

Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970)............................ 14,15

Parson v. Kaiser Aluminum & Chemical Corp., 575 F. 2d 1374 (5th Cir. 1978)...................... 19

Stastny v. Southern Bell Telephone and Telegraph Company, 628 F.2d 267 (4th Cir. 1980) 12,13

Taylor v. Teletype Corporation, 475 F.Supp. 958 (E.D. Ark. 1979) 2,6

Texas Department of Community Affairs v. Burdine, 450 U.S. ____, 67 L.Ed.2d 207 (1981)............ 21

Wade v. Mississippi Cooperative Extension Service, 528 F.2d 508 (5th Cir. 1976)....................16,17,18,19

Wright v. National Archives and Records Service, 609 F.2d 702 (4th Cir. 1979) 15,16,17

Statutes Cited

28 U.S.C. § 1343(3) and (4) 1

42 U.S.C. § 1981 1,17

42 U.S.C. § 1982 17

42 U.S.C. § 1983 17

42 U.S.C. § 2000e-5(f) 1

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1982

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

No. 81-152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TELETYPE CORPORATION,
Petitioner,

v.

TOMMIE W. TAYLOR, LARRY C. PEYTON, JAMES H. BIBBS
and JOSEPH HARRIS,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Eastern District of Arkansas by Tommie W. Taylor and Larry C. Peyton against Teletype Corporation pursuant to 28 U.S.C. §1343(3) and (4), 42 U.S.C. §2000e-5(f) and 42 U.S.C. §1981.

On June 5, 1979 the trial court certified the demotion class to be represented by respondents:

> Those black employees of the defendant who were demoted on or after February 28, 1974 including both bargaining-unit and non-bargaining-unit employees, and including those persons still employed by defendant and those employees no longer employed by defendant.

Taylor v. *Teletype Corporation,* 475 F.Supp. 958, 961 (E.D. Ark. 1979). At the beginning of the trial in the district court, petitioner and respondents agreed that the findings of fact and conclusions of law in *Hoard* v. *Teletype Corporation,* 450 F.Supp. 1059 (E.D. Ark. 1978) would be treated as *res judicata. Id.* at 960.

The *res judicata* findings of fact in *Hoard* extablish that petitioner commenced operating its Little Rock, Arkansas plant in 1957, and, when petitioner first opened that plant, the only blacks it hired were employed as janitors, and it did not hire any blacks, as an example, as production or clerical employees. *Id.* at 1061. The first black employed by petitioner in a position other than as a janitor was hired in 1960, and the failure of petitioner to employ blacks other than in janitorial positions to 1960 was racially motivated. *Id.* at 1062. By July 1, 1962 petitioner had employed 1 black as a clerical, 5 blacks were employed in the bargaining unit in grades-91 through 93 but no blacks were employed in higher positions. As of July 30, 1964 only 28 or 7% of petitioner's 393 employees were black. Of these, 2 were clerical employees, 3 were janitors, 20 were unskilled production employees and 3 were semi-skilled production employees. There were blacks living in Little Rock at the time the plant opened through 1964, who were qualified for most of the positions at petitioner's plant, including production, craft, clerical, professional and supervisory positions. On July 2, 1964 blacks were underrepresented in most classifications in petitioner's workforce. Petitioner continued to discriminate against blacks in hiring in all positions other than service, clerical and operative positions below grade-95 to at least 1971. From 1971 to on or about December 3, 1974 it hired more blacks into operative positions and employed some blacks in the trades group, technician and lower grade professional positions but continued to discriminate against blacks in hiring with respect to higher grade professional and supervisory positions. *Id.* at 1064.

Since September 18, 1959 Local 2022, International Brotherhood of Electrical Workers has been the certified collective bargaining representative for petitioner's production and maintenance employees. Under the terms of the relevant collective bargaining agreements, seniority is a factor but is not controlling in movement of employees within the bargaining unit. Management retained final approval of movement within the production unit. *Id.* at 1063. Petitioner uniformly discriminated against blacks with respect to promotions above grade-95 and to supervisory positions to approximately 1970. Thereafter, petitioner promoted a few blacks to section chief and to grades-96 through 98, but petitioner continued to discriminate against most blacks with respect to promotions to supervisory positions or to grades above grade-95 to on or about December 3, 1974. This discrimination could not be explained or justified by the seniority provisions of the collective bargaining contract or the seniority practices of petitioner.

Petitioner had no affirmative action plan to bring qualified blacks to its plant until 1970, and petitioner did not appoint an EEO coordinator for its Little Rock plant until 1971, and the EEO coordinators appointed by petitioner were not properly trained or given adequate direction and support and were unable to provide an effective affirmative action program. *Id.* at 1062. Petitioner moved slowly over the years in providing promotional opportunities for blacks. Initially it hired blacks only in the very lowest categories, and, over the years, it expanded their opportunities, but petitioner's promotional policies were racially motivated from the time it opened its plant in Little Rock in 1957 to on or about September 6, 1977. While more jobs became open to blacks, some positions were still denied them as of on or about September 6, 1977. *Id.* at 1065. From February 19, 1975 to on or about September 6, 1977 petitioner refused to promote Richard Davis to the job of section chief because of his race. *Id.* at 1065. Although the *Hoard* court found that plaintiff had not established a *prima facie* case of discrimination regarding the discharge class it had certified, that court found that Alma Gipson and Wanda McKee were discharged because of their race. Additionally, petitioner discriminatorily implemented its absence control program against blacks. *Id.* at 1064.

As of on or about September 6, 1977 of the 119 blacks hired between 1971 and 1974, 20 or 16.5% had advanced to grade-94, 6 or 5% had advanced to grade-95 and only 2 or 1.7% were employed at grade levels above grade-95; of the 281 whites hired from 1971 to 1974, 47 or 17% advanced to grade-94, 10 or 4% had advanced to grade-95 and 24 or 8.5% had advanced to grades above grade-95; of the 119 blacks hired between 1971 and 1974, only 4 were hired into positions above grade-93, and, of the 281 whites hired during that same period of time, 45 were hired into positions above grade-93; petitioner employed 1 vice-president, 2 managers and 3 assistant managers, who were all white; petitioner employed 22 department chiefs, who were all white; petitioner employed 63 section chiefs of whom only 5 were black; petitioner employed approximately 45 designers and engineers, who were all white; petitioner employed approximately 100 persons in the trades group classifications of whom only 5 were black and petitioner employed 396 employees in grades-95 through 98 of whom 73 or 18.4% were black and of whom 323 or 81.6% were white. *Id.* at 1062.

Against the *Hoard* background, the district court found that respondents made a *prima facie* case with respect to black employees demoted between February 26, 1974 and December 31, 1976. 475 F.Supp. at 964. In reaching this finding, the district court relied on the layoff statistics presented by the respondents' statistician, Dr. Frank A. James. The district court found that Dr. James presented an analysis of layoffs at petitioner's Little Rock plant for 1975 and 1976, but was most cognizant that the extant case was a demotion case, and it found "a layoff is the ultimate downgrade, and many of the layoffs that occurred at Teletype were the result of demotions of higher graded employees, employees who in turn "bumped" others, thus ultimately resulting in layoffs. Layoff statistics, therefore, may reasonably be considered a proxy for demotions for purposes of analysis." 475 F.Supp. at 962. Based on the analysis of Dr. James, the district court found that from 1974 through 1976, a total of 457 employees were laid off at petitioner's Little Rock plant, and, of the 457 persons laid off, 113, or 24.7%, were black, while 344, or 75.3%, were white. During that same period of time, the district court found that blacks constituted 20.4% of the workforce. 475 F.Supp. at 962. With this as a predicate, the district court determined that the number of blacks laid off during this period yielded a standard deviation of 2.28, and, relying on the uncontradicted testimony of Dr. James, the district court found that "a standard deviation of 2.28 enables a statistician to state, with a confidence level between 98 and 99, that some factor other than random selection was in operation." 475 F.Supp. at 962. The district court found that the respondents' layoff statistics resulting in a standard deviation of 2.28 would not alone be sufficient to make a *prima facie* case of discrimination. But, the district court did use that statistical evidence, in conjunction with other evidence, to find that respondents made a *prima facie* case with respect to black employees demoted between February 28, 1974 and December 31, 1976. The evidence used by the district court, in conjunction with the layoff statistics, to find the *prima facie* case was (1) petitioner initiated an apprentice training program in 1957 but no blacks were accepted into it until 1971 (2) petitioner breached its affirmative action commitment (3) the demotions and layoffs in the extant case were not made pursuant to a bona fide seniority system but were discriminatorily implemented pursuant to subjective criteria (4) the management decision to demote and/or to layoff employees was made without reference to affirmative action goals and (5) the managerial decision to demote and/or layoff was made by white supervisory and salaried employees. 475 F.Supp. at 962-964.

The district court found that petitioner discriminatorily demoted Taylor on September 22, 1975 from grade-910 to grade-906, and further found that petitioner discriminatorily "laid off" Taylor on September 26, 1975. 475 F.Supp. at 967 and 968. "In short, Ms. Taylor was forced out of the company. She had no real choice except to accept a layoff." "The Court therefore finds that the company has not successfully rebutted the *prima facie* case of racial discrimination with respect to Ms. Taylor's second demotion and subsequent layoff." 475 F.Supp. at 968. The district court also found that petitioner discriminatorily demoted Peyton, James H. Bibbs and Joseph Harris.

With the exception of Bibbs, the Eighth Circuit affirmed the decision of the district court. *Taylor* v. *Teletype Corporation*, 648 F. 2d 1129 (8th Cir. 1981). The Eighth Circuit also relied on *Hoard* as providing background evidence of petitioner perpetrating deliberate racial discrimination since it opened its Little Rock plant in 1957. "The *Hoard* opinion, as well as the findings by Judge Arnold, detail a history of deliberate racial discrimination by the Company, beginning with Teletype's opening of the Little Rock plant in 1957." *Id.* at 1131. In affirming the district court's finding of classwide discrimination, the Eighth Circuit found (1) that the layoff statistical analysis of Dr. James established a standard deviation of 2.28, which was within the 2 to 3 deviation test suggested by this Court as acceptable statistical proof of discrimination (2) that layoff statistics were relevant to establishing a class of demotion discriminatees because Article 28 of the relevant collective agreement corroborated the district court's finding that a layoff is itself a demotion and that many of those laid off had been demoted first and later dismissed because they could not be placed after demotion (3) that petitioner had not demonstrated the irrelevancy of the layoff statistics by showing that no relationship existed between layoffs and demotions (4) that petitioner's demotion statistics for the years 1974 through 1979, which were considered by the district court, were not sufficiently refined to negate respondents' layoff statistical showing of discrimination (5) that respondents' layoff data base, as found by the district court, was not erroneous and that petitioner produced no evidence to demonstrate that respondents' data base produced inaccurate results or that a different result would have obtained had Dr. James used a different data base (6) that the demotions and layoffs were not made pursuant to a bona fide seniority system because the demotions and layoffs were not controlled by seniority and were made pursuant to subjective managerial standards and (7) the *prima facie* case of classwide discrimination was based not only on the layoff statistics but on the totality of all of the relevant evidence. *Id.* at 1133-1135.

In the section of its decision discussing "classwide discrimination," the Eighth Circuit never made any reference to "relatively weak" proof or that respondents' proof constituted "merely a few isolated illegal acts." *Id.* at 1132-1135.

The Eighth Circuit affirmed the district court's findings that Taylor was discriminatorily demoted from a grade-910 to a grade-906 and was subsequently discriminatorily laid off. *Id.* at 1137.

In vacating the district court's permanent injunction, the Eighth Circuit stated in pertinent part:

> . . . In considering the grant of an injunction, the district court, of course, must consider voluntary efforts at correcting past discrimination, but such efforts do not preclude injunctive relief. Although we cannot say at this point in the litigation that the district court abused its discretion, we nevertheless must order the permanent injunction vacated as prematurely granted.
>
> The issuance of the injunction rested on relatively weak, although sufficient, evidence of classwide discrimination, and on the finding of discrimination in four individual

> cases. Weighing these findings against the finding of no discrimination for the three years immediately preceding the injunction, we have serious doubt as to the appropriateness of this kind of relief. We need not finally determine the propriety of the permanent injunction in this appeal, however, for the district court has yet to decide many of the individual claims for relief. Until those cases are decided, the question of whether Teletype engaged in widespread discrimination, or merely a few isolated illegal acts, remains open. This incomplete record will not justify permanent injunctive relief at this time. We, therefore, vacate the injunction.

Id. at 1136 (Citations and footnotes omitted).

ARGUMENT: REASONS FOR DENYING THE WRIT

I. The Decision Of The Eighth Circuit Does Not Conflict With Teamsters.

The Eighth Circuit's affirmation of the district court's finding of classwide discrimination does not conflict with *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977). Under *Teamsters* and its progeny, it is now well settled that, although statistical evidence may not of itself establish discrimination, it may be used with other evidence to establish discrimination. *Id.* at 338-339. In *Teamsters,* this Court stated, "Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Id.* at 339-340. The district court, as recognized by the Eighth Circuit, correctly applied the rule articulated by this Court in *Teamsters.* The Eighth Circuit, in affirming the district court's finding of classwide discrimination, was cognizant that the district court did not rely only the layoff statistics to establish the *prima facie* case of classwide discrimination, and was aware that the district court considered other relevant evidence to reach that conclusion. Analytically the Eighth Circuit recognized (1) that the district court determined that the *Hoard* history of deliberate discrimination perpetrated by petitioner was most relevant (2) that the district court considered petitioner's subjective decisionmaking in its demotion practices which were made by white supervisors (3) that petitioner breached its affirmative action program and failed to support its affirmative action director as sufficient to support the district court's finding of classwide discrimination. 648 F.2d at 1135. This appellate analysis does not conflict in any manner whatsoever with the principles articulated by this Court in *Teamsters.*

Petitioner appears to be arguing that the evidence of classwide discrimination has its underpinnings girded in "isolated or accidental or sporadic" acts of discrimination rather than premised upon petitioner's "standard operating procedure." This argument does not withstand scrutiny. Petitioner agreed that the *Hoard* findings of fact and conclusions of law would be *res judicata* in the extant case. The *Hoard* findings and conclusions, upon which the district court relied and the Eighth Circuit recognized, established a history of deliberate racial discrimination perpetrated by petitioner from 1957 to on or about September 6, 1977. Certainly, the *Hoard* findings and conclusions establish that from July 2, 1965 to on or about September 6, 1977 petitioner discriminatorily failed to hire blacks, discriminatorily failed to promote blacks above grade-95 and to supervisory positions, had an ineffective affirmative action plan, did not train its EEO coordinators which resulted in their inability to provide an effective affirmative action program, discriminatorily failed to promote Richard Davis from February 19, 1975 to on or about September 6, 1977 to the job of section chief, discriminatorily discharged Alma Gibson and Wanda McKee and discriminatorily implemented its absence control program against blacks. This is powerful evidence of petitioner engaging in a "pattern or practice" of racial discrimination at its Little Rock plant. In the context of this petitioner "standard operating procedure", the district court, with the approval of the Eighth Circuit, found (1) that petitioner was discriminatorily demoting blacks as a class at its Little Rock plant (2) that petitioner discriminatorily demoted and laid off Taylor and (3) that petitioner discriminatorily demoted Peyton and Harris. In these circumstances, the decision of the Eighth Circuit that the district court's finding of classwide discrimination was not clearly erroneous did not conflict with *Teamsters*.

Petitioner also appears to argue that the district court and the Eighth Circuit should have accepted its evidence and its statistics. As an example, on page 12 of its petition, petitioner states, "Out of 16 individuals who testified and attempted to prove specific individual discriminatory demotions, the district court accepted only four and the court of appeals vacated one of those findings. Thus, out of 1132 demotions (including 301 black demotions) only three were not satisfactorily explained by Teletype." This Court rejected the same kind of argument in *Teamsters*. This Court stated:

> The company's evidence, apart from the showing of recent changes in hiring and promotion policies, consisted mainly of general statements that it hired only the best qualified applicants. But "affirmations of good faith in making individual selections are insufficient to dispell a prima facie case of systematic exclusion."
>
> The company also attempted to show that all of the witnesses who testified to specific instances of discrimination either were not discriminated against or suffered no injury. The Court of Appeals correctly ruled that the trial judge was not bound to accept this testimony and that it committed no error by relying instead on the other overpowering evidence in this case. . . .

International Brotherhood of Teamsters v. *United States, supra* at 342-343 n. 24. By parity of reasoning, the Eighth Circuit was correct in affirming the district court's finding of classwide discrimination. According to the Eighth Circuit, the district court cited appropriate evidence, together with the layoff statistics and other relevant evidence, to support its *prima facie* finding of classwide discrimination. By necessary implication, the Eighth Circuit is stating that the district court was absolutely correct as the trier of fact in rejecting petitioner's contentions after giving them due consideration.

Petitioner appears also to argue that the Eighth Circuit should have required the district court to litigate all of the class claims at the liability stage of the trial. This is couched in terms of respondents failing to demonstrate more than a few isolated illegal acts during the trial on liability. This argument does not withstand scrutiny, and this Court answered such an argument in *Teamsters,* when it stated in pertinent part:

> The Court of Appeals was also correct in the view that individual proof concerning each class member's specific injury was appropriately left to proceedings to determine individual relief. In a suit brought by the Government under §707(a) of the Act the District Court's initial concern is in deciding whether the Government has proved that the defendant has engaged in a pattern or practice of discriminatory conduct.

Id. at 342-343 n. 24. Similarly, the Eighth Circuit affirmed the district court's finding of classwide discrimination and left the litigation of the individual claims of the class members for the stage 2 proceedings in this matter.

Petitioner also appears to argue that the Eighth Circuit was in error in categorizing the extant case as a "disparate treatment" case rather than a "disparate impact" case. In making this contention, petitioner argues that the district court found that there was no showing that the disparate impact of layoffs and demotions in 1975 "was the result of a conscious effort to harm blacks as such." 475 F.Supp. at 964. In furtherance of this contention, petitioner argued that the Eighth Circuit misconstrued the district court's finding and in effect "explained away" a direct finding by the district court of an absence of an intent by petitioner to treat blacks differently as to demotions which would "expressly negate a disparate treatment case." To support this contention, petitioner relied upon *Teamsters* and *Stastny* v. *Southern Bell Telephone and Telegraph Company,* 628 F.2d 267 (4th Cir. 1980). Petitioner cited *Stastny* to define the difference between a "disparate treatment" and "disparate impact" case and to establish that, in a Title VII class action case, the class action inquiry "must" take both theories into account. *Id.* at 273 n. 9. Initially, *Stastny* miscited *Teamsters* for that proposition. In *Teamsters,* this Court, after defining "disparate treatment" and "disparate impact" stated, "Either theory *may* of course, be applied to a particular set of facts." *International Brotherhood of Teamsters* v. *United States,* 431 U.S. at 335-336 n.15 (Emphasis added). This Court was not mandating that a court of appeals, such as the Eighth Circuit, apply both theories to a class action case. Obviously, what this Court said in *Teamsters* was that in certain circumstances a lower federal court *may* be required to apply both "disparate treatment" and "disparate impact" theories to a particular set of facts. Ironically, in *Stastny,* the Fourth Circuit stated, "In the instant case, it is clear that plaintiffs' ultimate reliance would of necessity have been upon showing a pattern of disparate treatment. There is no suggestion in the record of a Griggs-type objectively imposed practice having discriminatory disparate impact." *Stastny* v. *Southern Bell Telephone and Telegraph Company, supra* at 274 n. 10. Additionally, this contention of petitioner does not withstand analysis, because petitioner took what the district court stated out of context. After the district court made all of its findings pertaining to the classwide discrimination, the district court summarized in pertinent part:

> To summarize, the company has a proved history of discrimination on the basis of race extending in some respects up to as late as 1974. . . . The Court does not wish to be understood as minimizing the efforts that Teletype did make. . . . There is no showing that the disparate impact of layoffs and demotions in 1975 was the result of a conscious effort to harm blacks as such. The fact remains, however, that blacks were harmed more than whites, and this harm cannot be ascribed entirely to the operation of a bona fide seniority system that had only the effect of perpetuating pre-Act discrimination. Here, a substantial amount of discrimination was still continuing as long as 10 years after the Act was passed. . . .

475 F.Supp. at 964. When the district court's summary is read as a whole, it is clear that the district court was clearly finding that petitioner was consciously treating blacks as a class different than whites when it demoted its employees in this case. In the context of the district court's summary, when it stated, "There is no showing that the disparate impact of layoffs and demotions in 1975 was the result of a conscious effort to harm blacks as such," the district court was making that statement in reference to the next sentence, which stated, "The fact remains, however, that blacks were harmed more than whites, and this harm cannot be ascribed entirely to the operation of a bona fide seniority system that had only the effect of perpetuating pre-Act discrimination." Stated another way, in the context of the district court's summary, the district court was stating that the demotions and layoffs impacted more on blacks than whites and that the impact was not due to the operation of a bona fide seniority system. In any event, when the district court's opinion is read as a whole, it is clear that the district court viewed all of respondents' claims as alleging discriminatory treatment, and the Eighth Circuit's affirmation of that finding of the district court is not clearly erroneous. The Eighth Circuit properly construed the aforementioned statement of the district court, based on the district court's opinion as a whole, as the district court merely expressing its belief that no direct evidence of conscious or malicious racial animous had been presented. 648 F.2d at 1133 n.7. This finding of the Eighth Circuit is not clearly erroneous.

Petitioner argues that its discriminatory employment practices delineated in *Hoard,* which did not pertain to demotions, should not be used by respondents to establish the existence of classwide intentional racially discriminatory demotion practices. This contention is a sham and does not warrant much discussion. See *Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421 (8th Cir. 1970) and *Donaldson* v. *The Pillsbury Company,* 554 F.2d 825 (8th Cir. 1977). It is noteworthy that this Court cited *Parham* with approval in *Teamsters. International Brotherhood of Teamsters* v. *United States, supra* at 339-340 n.20. The petitioner's attempt to disavow the *res judicata* findings of *Hoard* is meritless because petitioner agreed that those findings could be so considered by the district court. Petitioner is attempting to evade the *Hoard* findings because they establish practices from July 2, 1965 to September 6, 1977. As an example, during that period of time, petitioner was discriminatorily failing to promote blacks above grade-95 and to supervisory positions.

II. The Decision Of The Eighth Circuit Does Not Conflict With Rodriguez.

Petitioner argues that respondents should not be relieved of the burden of demonstrating the existence of a class of persons possessing the same interest and suffering the same injury. *East Texas Motor Freight, Inc.* v. *Rodriguez,* 431 U.S. 395 (1977). Apparently, petitioner bases this contention on its allegation that no respondent was laid off. This case does not involve a layoff class but a demotion class and petitioner's contention is therefore specious. Certainly, the district court, with the approval of the Eighth Circuit, used layoff statistics as a piece of evidence to assist it to conclude that petitioner had a racially discriminatory demotion policy from February 28, 1974 to December 31, 1976. Peyton and Harris were discriminatorily demoted by petitioner. Even though, both the district court and the Eighth Circuit found, in fact, that petitioner discriminatorily demoted *and* "laid off" Taylor, this case does not need a representative for a "layoff" class that does not exist.

III. The Decision Of The Eighth Circuit Does Not Conflict With Decisions Of Other Courts Of Appeal.

Petitioner argued that the decision of the Eighth Circuit in this case conflicts with decisions of the Fourth and Fifth Circuits. In support of this contention, petitioner cites *Wright* v.

National Archives and Records Service, 609 F.2d 702 (4th Cir. 1979) and *Wade v. Mississippi Cooperative Extension Service,* 528 F.2d 508 (5th Cir. 1976). Petitioner contends *Wright* and *Wade* recognize the "isolated acts" doctrine and require a showing of systematic discrimination in connection with challenged classwide discrimination.

Although the *Wright* case commenced as a class action, it was tried as an individual action, and it was considered on appeal by the Fourth Circuit as an individual claim. *Wright* v. *National Archives and Records Service, supra* at 705 n. 1.

Because there had been some confusion about whether the claims of James B. Wright were properly to be analyzed under the "disparate treatment" or "disparate impact" test, the Fourth Circuit, as did the district court, analyzed his claims under both theories. *Id.* at 710-711. In analyzing the individual claim of James B. Wright under the disparate impact theory, the Fourth Circuit articulated that the policy or practice contemplated by the disparate impact doctrine consists of more than isolated or accidental or sporadic discriminatory acts and has reference to the employer's standard operating procedure. *Id.* at 712. In discussing the alleged discriminatory aspects of the employer's training program in that case, the Fourth Circuit found that the impact of that training program only affected James B. Wright and no other employee. *Id.* at 712. Regarding the individual nature of the claim it was analyzing, the Fourth Circuit stated in pertinent part:

> Within this setting Wright's legal claim, advanced solely on his behalf and not that of any other black trainee, thus comes to the proposition that the training program as administered did not equip him, a black, but did equip Whitelock, a white, for the promotion in grade that was the goal of both and the purpose of the program. . . .
>
> . . . .

> While we quite agree that an individual may, in appropriate circumstances establish without elaborate statistical proof a disparate impact *prima facie* case, we cannot agree that the doctrine can fairly be applied to a situation such as that one here where the total set of affected persons is so small, the protected group is numerically dominant in the total set, and the adverse "impact" is finally experienced by only one of the numerically dominant protected group.

Id. at 712. But this case is a "discriminatory treatment" case, and the petitioner's "pattern or practice" of discriminatory conduct at its Little Rock plant was not a series of "isolated acts" but was its "standard operating procedure" there. Therefore, *Wright* is distinguished from the extant case both on its facts and the applicable law. Therefore, there is no conflict between the decision of the Eighth Circuit in this case and any of the decisions of the Fourth Circuit.

Wade is a non-Title VII case, and it was decided before *Teamsters.* The plaintiffs in *Wade* filed a class action against Mississippi Cooperative Extension Service (MCES) and other defendants based on violations of the Fifth and Fourteenth Amendments to the United States Constitution, Title VI of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981, 1982 and 1983. *Wade* v. *Mississippi Cooperative Extension Service, supra* at 510. The district court in *Wade* found that racial discrimination existed in several specific areas, based in part on statistical evidence, but also supported by evidence of specific instances of discrimination. In addition to finding racially discriminatory promotion practices, the district court found that the evaluation form used for evaluating professional workers was discriminatory, that job assignments were racially motivated, that there were racially motivated salary practices, that there was a lack of affirmative action in MCES's hiring practices and that MCES was supporting and sanctioning segregated local 4H clubs. *Id.* at 514. The plaintiffs before the district court statistically established salary differentials between black and white professional MCES workers which were corroborated by evidence of other disparities.

On appeal, as relevant to this case, appellants argued that the district court finding that they had engaged in a pattern of discriminatory employment practices was clearly erroneous. *Id.* at 515. The Fifth Circuit rejected appellants' attack on the statistical evidence because (1) the district court did not rely solely on plaintiffs' statistical evidence but relied on other easily understood data (2) there was additional evidence of specific instances of black workers with essentially similar experience and qualifications as white workers receiving less pay (3) appellants did not rebut the *prima facie* case based on the statistical evidence alone or based on the statistical evidence corroborated by other evidence (4) the evaluation form used by appellants was discriminatory and (5) the "concept of job applied for" was subjective and subject to the conscious or unconscious prejudices of appellants' evaluators. *Id.* at 516-517. The *Wade* rule may be summarized as stating that, although statistical evidence alone may be enough to support a *prima facie* case, a Title VII plaintiff stands an even greater chance of conclusively proving discrimination when that evidence is buttressed with live testimony. In fact, a federal district court within the jurisdiction of the Fifth Circuit has so held. *See Booth* v. *Board of Directors of National American Bank*, 475 F.Supp. 638, 653 n.13 (E.D. La. 1979). *Booth* was cited by petitioner in its petition at page 11. Regarding, *Booth*, it suffices to state that the district court specifically found that plaintiff's *prima facie* cases of hiring, pay-at-hire for clerical employees and discharge of clerical employees were specifically rebutted by defendants. In a post-*Teamsters* case, the Fifth Circuit stated in pertinent part pertaining to a promotion-to-foreman class:

> The District Court's evaluation of the likelihood of injury suffered by members of the class by the pre-1972 promotion procedures was a finding that "blacks occupied many salaried positions" at the plant. This ignores the statistical context provided by the plaintiff. We have sketched the disparities between the numbers of black hourly and black salaried employees, and between black & white salaried employees. Depositing of black foremen and the concentration of blacks in nonsalaried positions constitute a substantial statistical discrepancy that could alone establish a prime facie case of unlawful discrimination. Moreover, the statistical patterns do not complete the plaintiff's case. In addition to Kaiser's use of invalid procedures through 1972, the acknowledged presence of pre-Act discrimination, and the statistical discrepancies, Parson presented testimony by individuals of their experiences under these procedures. As the Supreme Court noted in *Teamsters* . . . "The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life."

Parson v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1379-1380, 1385-1387 (5th Cir. 1978) (Citations and footnotes omitted). All of these decisions implement the rule in *Teamsters*, "But, as even our brief summary of the evidence shows, this was not a case in which the Government relied on statistics alone. The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life." *International Brotherhood of Teamsters* v. *United States, supra* at 339. There is no conflict between the decision of the Eighth Circuit in this case and between the *Wade* and *Parson* decisions of the Fifth Circuit.

IV. The Decision of the Eighth Circuit Does Not Conflict With Its Greenholtz Decision.

Petitioner argues that the decision of the Eighth Circuit in this case conflicts with its decision in *Inmates of the Nebraska Penal and Correctional Complex* v. *Greenholtz*, 567 F.2d 1368 [illegible]h Cir. 1977). In *Greenholtz*, the Eighth Circuit specifically found that plaintiffs' statistical evidence represented less than 2 standard deviations. *Id.* at 1377-1378. Regarding this statistical evidence, the Eighth Circuit stated in pertinent part:

> The above analysis leads us to the conclusion that the statistical showing in this case is not quite sufficient to permit a confident determination that the disparities shown are related to racial and ethnic factors and is therefore not quite sufficient substantially to assist plaintiffs in establishing a prima facie case of racial and ethnic discrimination. Although the Supreme Court has not in terms established a two standard deviation "floor" for statistical significance . . . a confidence showing of statistical significance begins to arrive at that level.
>
> We recognize, of course, that the statistical disparities in this case *approach* the level seemingly deemed significant . . . . For that reason we declined to go the distance with the district court and hold the disparities utterly without significance. If the remainder of the plaintiffs' evidence came close to establishing a prima facie case, we might agree that their statistics would tip the balance. Insofar as plaintiffs rely on their statistics as a primary component of their prima facie case, however, we are in disagreement.

Id. at 1379 (Citations and footnotes omitted). In this case, the Eighth Circuit affirmed the district court's finding that respondents' layoff statistics yielded a standard deviation of 2.28 within the 2 to 3 deviation figure suggested by this Court. Respondents' layoff statistics yielding a standard deviation of 2.28 indicate statistically a likelihood of only 1 or 2% that pure chance was responsible for the demonstrated racial disparity. 648 F.2d 1133 n. 8. This clearly distinguishes the extant case from *Greenholtz*. Finally, in *Greenholtz*, the Eighth Circuit found that there were only 2 or 3 individual cases to buttress the statistics, which it found insufficient to provide more than minimal support to an inference of classwide purposeful discrimination. *Inmates of the Nebraska Penal and Correctional Complex* v. *Greenholtz*, *supra* at 1381. This is in contradistinction to the corroborating evidence existent in this case to buttress the layoff statistics. In fact, if the *Greenholtz* panel had the evidence before it that the Eighth Circuit had before it in this case, it is fair to infer that the *Greenholtz* panel would have given credence to the statistics to tip the balance in favor of an inference of classwide purposeful discrimination. Clearly, there is no conflict between the Eighth Circuit's decision in this case and in its *Greenholtz* decision.

V. This Court's Decision In *Burdine* Is Inapposite.

Petitioner argues that the Eighth Circuit erroneously did not apply the principles of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. ____, 67 L.Ed.2d 207 (1981) to the individual claims of Taylor, Peyton and Harris. This contention is premised upon the Eighth Circuit's finding of classwide discrimination being clearly erroneous. However, as this brief demonstrates, petitioner's premise is wrong and *Burdine* is inapposite.

VI. The Attorneys for the Respondents Are Entitled to a Court Awarded Attorneys' Fee to be Paid by Petitioner.

If the Court denies petitioner's petition for a writ of certiorari, the Court is urged to award respondents' attorneys an attorneys' fee to be paid by the petitioner, because they will have been the prevailing parties in this Court. In such a circumstance, the attorneys for respondents will be most happy to submit an affidavit to the Court and/or the Eighth Circuit and/or the trial court detailing the time spent briefing this case to this Court.

CONCLUSION

For the reasons stated above, the Court should deny the petition.

Respectfully submitted,

JOHN T. LAVEY
P.O. Box 2657
Little Rock, AR 72203

PERLESTA A. HOLLINGSWORTH
900 Tower Building
Little Rock, AR 72201
Attorneys for Respondents

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
OCT 26 1981
[illegible] L. STEVAS,
CLERK

No. 81-512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TELETYPE CORPORATION,
Petitioner,

vs.

TOMMIE W. TAYLOR, LARRY C. PEYTON, JAMES H. BIBBS
AND JOSEPH HARRIS,
Respondents.

REPLY BRIEF

G. ROSS SMITH
1215 Tower Building
Little Rock, Arkansas 72201
(501) 376-6604

JAMES M. STAULCUP, JR.
5555 Touhy Avenue
Skokie, Illinois 60077
(312) 982-3090
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

Page

ARGUMENT:

REPLY TO ADDITIONAL ARGUMENTS RAISED IN BRIEF IN OPPOSITION.

I. PETITIONER DID NOT AGREE THAT THE FINDINGS IN *HOARD* WOULD BE RES JUDICATA IN THIS CASE, AND THE TRIAL AND APPELLATE COURTS' TREATMENT OF SUCH FINDINGS AS RES JUDICATA WAS ERROR 1

II. THE TRIAL AND APPELLATE COURTS' MISPLACED EMPHASIS UPON THE FINDINGS IN HOARD DISTORTED THE BURDEN IMPOSED UPON THE PETITIONER BY THIS COURT IN *BURDINE* .. 4

CONCLUSION 8

APPENDIX

A. Transcript of Trial, Taylor v. Teletype Corp., 475 F.Supp. 958 (E.D. Ark. 1978), pp. 5-12. . A-1

TABLE OF AUTHORITIES

Page

Hoard v. Teletype Corp., 450 F.Supp. 1059 (E.D. Ark. 1978) 1,2,3,5,8

Taylor v. Teletype Corp., 475 F.Supp. 958 (E.D. Ark. 1979) 1,2,4,5

Swift & Co. v. Hocking Valley R. Co., 243 U.S. 281 (1917) 2

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 2,8

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 5

California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) 5

Texas Department of Community Affairs v. Burdine, 450 U.S. ____, 67 L.Ed.2d 207 (1981) 6,7,8

No. 81-512

In The

Supreme Court of the United States

October Term, 1981

Teletype Corporation,
Petitioner,

vs.

Tommie W. Taylor, Larry C. Peyton, James H. Bibbs
And Joseph Harris,
Respondents.

REPLY BRIEF

ARGUMENT

Reply To Additional Arguments Raised In Brief In Opposition

Respondents raise in their Brief in Opposition the issue of whether petitioner agreed to accept as res judicata in the instant case the findings of the district court in *Hoard* v. *Teletype Corp.,* 450 F.Supp. 1059 (E.D. Ark. 1978). Contrary to respondents' brief (p. 2) and the district court's opinion (475 F.Supp. at 960) petitioner did not agree to treat the *Hoard* findings as res judicata. In fact, petitioner's counsel pointed out to the district court that certain findings in *Hoard* were made only to determine whether plaintiffs there had established a prima facie case (T. 7); stressed that the prima facie case based on those findings was rebutted except with regard to four job categories (T. 7, 11); and firmly maintained the position that preliminary findings comprising a prima facie case which had been rebutted could not be conclusive in the instant case (T. 11) (The portion of the transcript which contains the entire colloquy regarding the res judicata effect of *Hoard* on the instant case (T. 5-12) is appended at A-1). Further, even if petitioner had stipulated to the res judicata effect of *Hoard*, it would have been a stipulation of law by which the district court was not bound and by which this Court certainly is not bound. *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U.S. 281, 289 (1917).

It must be emphasized that *Hoard* and *Taylor* are separate causes of action. For this reason, any preclusive effect in *Taylor* of the findings in *Hoard* would be by collateral estoppel, not res judicata.[1] Collateral estoppel precludes relitigation of issues actually litigated and *necessary to the outcome* of a prior action. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979) (Emphasis added). An examination of the *Hoard* decision will show that none of the findings relied upon in *Taylor* can be said to have been necessary to the outcome in *Hoard*.

The *Hoard* court held that plaintiffs failed to establish a prima facie case of discrimination with respect to the class of employees allegedly discharged on the basis of race. 450 F.Supp. at 1068. With respect to a class of employees who had allegedly been denied promotions because of their race, the court found that "on the basis of the *record as a whole*, the plaintiffs established a prima facie case of discrimination" but that "Teletype satisfied its burden of proof of rebutting the prima facie case except with respect to promotions to grades 97 and 98, section and department chief." *Id.* (Emphasis added). The court then reiterated the findings which comprised the prima facie case and reemphasized that "Teletype did meet it burden of proof with respect to promotions to job classifications other than to grades 97 and 98, section and department chiefs." *Id.*

---

[1] "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979).

Clearly, no finding adverse to Teletype is *necessary* to the determination in *Hoard* that plaintiffs did not establish a prima facie case with respect to the discharge class. The prima facie case of the promotion class, based on the record as a whole, was for the most part rebutted by Teletype. 450 F.Supp at 1068. Significantly, the *Hoard* court listed the elements of the promotion class prima facie case - many of which were adopted by the district court in this case - and then reemphasized that this prima facie case was for the most part rebutted. *Id.* If the *Hoard* court's findings of fact constituted plaintiffs' prima facie case, and the prima facie case was rebutted by Teletype with respect to all but four job categories, how can those rebutted findings be said to have been necessary to the *Hoard* decision or to conclusively establish anything in this case? Petitioner submits that the *Hoard* court's findings which were relied upon in *Taylor* were not final; were made only for the preliminary purpose of determining whether a prima facie case had been established; were for the most part rebutted; and were not necessary to the outcome in *Hoard.*[1] Therefore, to apply such findings conclusively in this case was error.

---

[1] The conclusive findings in *Hoard* extablish no discrimination as to the discharge class and no discrimination in promotions as to all but four job categories. If anything, these findings, as pointed out in the Petition for Writ of Certiorari on pages 14 and 15, are contrary to the district court's findings and the Eighth Circuit Court's affirmance of discrimination in demotion practices.

II. The Trial And Appellate Courts' Misplaced Emphasis Upon The Findings In *Hoard* Distorted The Burden Imposed Upon The Petitioner By This Court In *Burdine*.

Having once determined that the district court improperly applied the doctrine of issue preclusion, we must judge the effect of that error upon the allocation of burdens between the parties in this action. The respondents, and the courts below, completely misapplied the classic burden-of-proof tests in Title VII cases. First, the courts confused the burdens required of plaintiffs in such cases by applying both impact and treatment tests, apparently when it suited a particular purpose. The plaintiffs' weak prima facie case is totally dispelled when the important distinctions between these two kinds of cases are applied to this fact situation.

The trial court found a prima facie case based upon three essential factors. The prior findings in *Hoard,* coupled with express findings that seniority alone was not controlling, and finally that the layoff evidence presented by respondents was somehow more convincing than the more relevant demotion evidence presented by petitioner, all taken together, established a prima facie case the petitioner could not rebut, because in order to do so, it was required to prove that race was not a factor in virtually every layoff or demotion that occurred in the Teletype plant in 1975.

The trial court expressly held that there was "no showing that the disparate impact of layoffs and demotions in 1975 was the result of a conscious effort to harm blacks as such." *Taylor, supra,* at 964. In a treatment case, that is tantamount to saying that the plaintiffs have failed to prove the essential factor in their prima facie case—discriminatory motivation. Clearly, if there was "no showing" on the issue of motivation, then the court could only have drawn an inference of discrimination from one of three sources. Either the findings in *Hoard* supplied the necessary showing—and, if so, the court was in error, as has been demonstrated above; or the court's finding of disparate impact upon Blacks in layoffs formed the basis for the decision, and again this is improper in a treatment case, as we have demonstrated in reliance on *Teamsters* v. *United States,* 431 U.S. 324 (1977); or, the court found liability based upon its finding that factors other than seniority played a part in the employer's layoff and demotion policies. This latter proposition is also in error, in light of this Court's application of *Teamsters* in *California Brewers Association* v. *Bryant,* 444 U.S. 598 (1980). In *Brewers,* this Court held that an employer is entitled to rely upon the immunity defense established by § 703(h) of the Civil Rights Act of 1964 if its conduct is pursuant to a seniority system, even if that system included rules which were not based solely on length of service, provided that the system was otherwise found to be bona fide. Implicit in the Court's holding was the proposition that *Teamsters* does not allow a "revolving door" test, in which the system is only immunized against impact if it is bona fide, and it is only bona fide if it has no impact. The only foundation offered by the trial court for a finding that petitioner's demotion and layoff rules, as included in its seniority system, were not bona fide was the "substantial amount of discrimination [that] was still continuing as long as ten years after the Act was passed." 475 F.Supp. at 964. But that finding could only have been premised upon the improper reliance on *Hoard.* There was no other evidence to show that the demotion policy was applied discriminatorily. Furthermore, there was never a proper finding in *Hoard* that the seniority system was not bona fide. If the court in *Taylor* was relying on the *Hoard* court's earlier finding that "the discrimination cannot be explained on the basis of seniority provisions of the collective bargaining agreement or the seniority practices of the company", *Hoard* at 1068, then that too was error. It is clear that *Hoard* misapplied *Teamsters,* in light of the fact that the court's only basis for holding that seniority did not rebut the plaintiff's prima facie case on promotions was that factors other than length of service were utilized in the system. That holding was excusable in a case decided two years before *Brewers,* but it cannot now withstand scrutiny. Absent some direct evidence that those "other factors" were applied discriminatorily, the system cannot now be found to be non-bona fide solely on the basis of *Hoard*. In fact, petitioner's and respondent's evidence clearly showed that the operation of those factors in its demotion policies had no measurable disparate impact which was statistically significant.

It is submitted that the respondents have failed to differentiate throughout this litigation between impact and treatment burdens, and that has had the effect of forcing the petitioner to satisfy a greater burden than should have been required to rebut the prima facie case. The trial court clearly held that there was no showing of intentional discrimination. That showing is required in disparate treatment cases. Instead, it found an "impact" upon the Blacks who had entered the workforce late—and used that impact to infer a motivation for which there was no other proof. This had the effect of forcing the petitioner to prove that discrimination was not a factor in its demotion practices (which it did show), a burden plainly uncalled-for after *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. ____, 67 L.Ed.2d 207 (1981). This Court was explicit in *Burdine* when it held that a plaintiff retains the burden throughout in a treatment case "of persuading the court that she has been the victim of *intentional* discrimination." *Burdine, supra* at ____, 67 L.Ed.2d at 217 (Emphasis added). Petitioner's only burden, even if the trial court was correct in crediting the respondents' statistics on layoff, was to present admissible evidence which raised a genuine fact issue as to the reasons for the employment decisions challenged. This it did, both by direct evidence as to the individual plaintiffs, and by a specific showing that there was no statistically significant impact upon Blacks in demotion policies. Such a showing was clearly enough to rebut any prima facie case which can properly be inferred from the plaintiffs' proof, absent a showing of pretext. It was therefore more than the trial and appellate courts' erroneous finding of classwide discrimination which motivated the petitioner to raise *Burdine* in its petition. It was the improper allocation of burdens, and particularly the significantly greater burden imposed upon the petitioner than is required in treatment cases, that demanded application of the principles set forth in ***Burdine***. There can be no doubt that the courts below imposed upon petitioner the burden of disproving a finding of classwide discrimination, which had been inferred from admittedly weak and circumstantial evidence and the improper application of issue preclusion principles. The effect of that requirement was to require the petitioner to do more than merely raise a genuine issue of fact, but rather to prove that discrimination was not a factor in its decisions. ***Burdine***, it is submitted, is therefore not only not "inapposite," it is controlling and demands reversal.

CONCLUSION

The *Hoard* findings figured pervasively and conclusively in this case. This fact is underscored by respondents' heavy reliance on *Hoard* in their Brief in Opposition. Respondents' statement of the case is essentially a statement of the *Hoard* case. The district court declared in this case that the *Hoard* findings were "res judicata." This was error under *Parklane* because the *Hoard* findings were preliminary and were not necessary to the outcome of that case.

The district court's conclusive application of the *Hoard* findings to this case had the effect of forcing petitioner to suffer the burden of proving that discrimination was not a factor in its demotion practices. The allocation of such burden to petitioner clearly contravenes this Courts' holding in *Burdine*. For the foregoing reasons and those set out in the petition for a Writ of Certiorari, a writ of certiorari should issue to review the opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

G. Ross Smith
1215 Tower Building
Little Rock, Arkansas 72201
(501) 376-6604

James M. Staulcup, Jr.
5555Touhy Avenue
Skokie, Illinois 60077
(312) 982-3090

Counsel for Petitioner

October 26, 1981

APPENDIX

APPENDIX

[5] THE COURT: Is there anything else that needs to be done before we begin?

MR. LAVEY: Your Honor, I would like to clear up one matter. I would suggest to the Court that the findings in the Hoard case made by Judge Heaney in the case found at 450 Fed. Sup. 1059., regarding those findings are res judicata and that the parties in this case, regarding such things as statistical findings and — primarily statistical findings. In any event, all of the findings are relevant to the issues in this case because the findings made by Judge Heaney span a period of time from approximately 1971 and either up to the time the trial started, I believe, in September of 1977, or up to the time at least that the complaint was filed [6] in that case, which I believe was filed on December 3 of 1974.

I would respectfully ask the Court to take judicial notice of all of those findings and make them a part of the record in this case.

I would move and request the Court to take judicial notice of them.

THE COURT: Do you join in that motion, Mr. Hollingsworth?

MR. HOLLINGSWORTH: Yes, I do.

THE COURT: What says the defendant?

MR. SMITH: May I be heard briefly?

THE COURT: Yes, sir.

MR. SMITH: May it please the Court. The defendant does not resist some judicial notice of Hoard to this Court provided that it is done in the proper context and the context of this litigation that we are here about to try today.

Number one, we take the position that the decision and the findings in Hoard are not evidentiary matters. I suppose that is not a matter of particular moment.

We do concede that some judicial notice may be given to it.

Secondly, the Court has held that Hoard involved different issues than the motion practices with which we are concerned with here.

[7] With regard to the issues decided in Hoard, certain findings were made to determine whether or not the plaintiffs there had established a prima facie case.

The Court then held that that prima facie case has to be effectively rebutted except with regard to claims of promotions to the four categories of employment, 97 and 98, department and section chiefs.

So all other categories of employees the prima facie case had been rebutted.

So the findings and conclusions may be considered on balance in weighing those things that the plaintiff feels are beneficial to them in this case, along with things that are beneficial to the defendant in this case, including the rebuttal of the prima facie case except with regard to the very limited range of categories.

On balance it is the company's position that Hoard — the findings and conclusions weight more favorably in its behalf than the plaintiffs' behalf in this controversy.

And finally, your Honor, plaintiffs must demonstrate at least some causation between the findings in Hoard than may be considered favorable to them and any discrimination which is alleged to exist in this case.

In the abstract those findings tell us nothing really about the motion practices. The evidence concerning hiring and promotion practices litigated in Hoard are motions [8] much closer related to each other than either one of these demotion practices, for example.

The evidence in Hoard does not necessarily reflect at all on demotion practices. It is our position that each plaintiff and intervenor must demonstrate that they were the victims of whatever discriminatory practices are shown to have existed.

With that qualification, your Honor, we do not resist the Court taking some judicial notice of the Hoard opinion and decision.

THE COURT: I am not sure what you mean, Mr. Smith, by some judicial notice.

MR. SMITH: Judicial notice of the findings without qualification, your Honor, in the context as I have defined them.

THE COURT: The motion goes only to — actually we're talking about two things. You have been using — interchanging them.

We are talking about judicial notice and we're talking about res judicata.

The affect of them would be the same. Namely the certain facts would be conclusively established.

But if I understand your position, it is that you do not object to this Court treating those facts as established. You do, however, take the position that those facts are in [9] your favor rather than in the plaintiffs' favor; is that correct?

MR. SMITH: That is correct, you Honor, with the addition that some of the fact findings — it is our contention that some of the fact findings were indulged in only to determine if a prima facie case had been established.

This Court says it had been established. Thereafter the Court says the prima facie case has been rebutted in many respects.

So on balance taking the Court's findings with a prima facie case and the rebuttal thereof, that's the point we're trying to get across to the Court.

THE COURT: Mr. Lavey, is your motion twosided? Do you want all of the findings and conlusions in Hoard treated as conclusive in this litigation?

MR. LAVEY: Yes, for the purpose of this trial, I want all of the findings and conclusions conclusive.

May I just respond briefly to Mr. Smith, sir?

THE COURT: Certainly.

MR. LAVEY: Obviously the findings in Hoard are used — hopefully can be used by the plaintiff as evidence in this case, certainly as an element of proof of discriminatory intent.

I would contend to the Court, as an example, a finding that Teletype began it's existence in 1957, when they [10] first hired blacks as janitors and those kinds of findings. This would establish the discriminatory attempt from my viewpoint, both as to — hopefully to the Tommie Taylor and Larry Payton case and the class allegations that we have.

Certainly we realize that although you might have this broad background of discrimination, we understand — plaintiffs understand they have the burden of proving to the Court as to their particular cases, in fact that there was individual discrimination.

However, this broad background of discrimination may be found by the Court, based on the Hoard findings to establish discriminatory motive.

THE COURT:I think I understand and I think I agree with that statement of the law.

If there were proof that either by statistics or specific instances of discrimination, that the defendant discriminated against somebody, not necessarily plaintiffs, but somebody else, that proof would be relevant to the issue of intent.

It would not be conclusive on the issue, but it would be relevant. Do you agree with that, Mr. Smith?

MR. SMITH: I think I do agree with that.

The problem that I see as going to arise is obviously for the Court to determine. That is the extent to which the findings in Hoard were in fact intended to be [11] conclusive.

If Judge Heaney indulged in a finding in his initial inquiry as to whether or not a prima facie case had been created and then finds that it had, and then finds that the case is rebutted, then I am not — the defendant is not in a position to agree to that preliminary finding, should it be conclusive in this litigation.

THE COURT: But his findings that the prima facie case was rebutted, the findings with respect to persons and not parties here, was it not?

MR. SMITH: Well, it was conclusive with regard to the class of individuals and which did not include classes as has been defined here.

THE COURT: Yes. So when you say that he held that the case has been rebutted with respect to some classes or some plaintiffs, that is quite true. I don't understand why it is relevant?

MR. SMITH: Well, it's relevant, your Honor, to the same extent the findings are beneficial to the plaintiffs were also made with regard to a class that is not present here.

THE COURT: But those findings related to the history of discrimination as it is claimed on the part of the defendant and that is relevant to any case in which a plaitniff claims to have been discriminatorily treated by this defendant, is it not?

[12] MR. SMITH: It is, your Honor.

THE COURT: All right, sir. The motion is granted.

The Court takes the findings and conclusions in Hoard as conclusive for the purposes of this litigation. That doesn't mean that they prove or do not prove any of the relevant facts here, but the Court will consider them.

As a matter of fact, as the lawyers know, I am sure, I have already read the Hoard opinion because it was debated between the lawyers with regard to a motion that was earlier pending.

There is no and has been no appeals; is that correct, Mr. Lavey?

MR. LAVEY: Not to my knowledge. Probably Mr. Hollingsworth can speak to that.

MR. HOLLINGSWORTH: That's correct. We just finalized the litigation and there will not be any appeal.

THE COURT: All right, sir. Mr. Lavey, are we ready to begin the trial?

MR. LAVEY: Yes, we are ready to begin.

* * * * * * *